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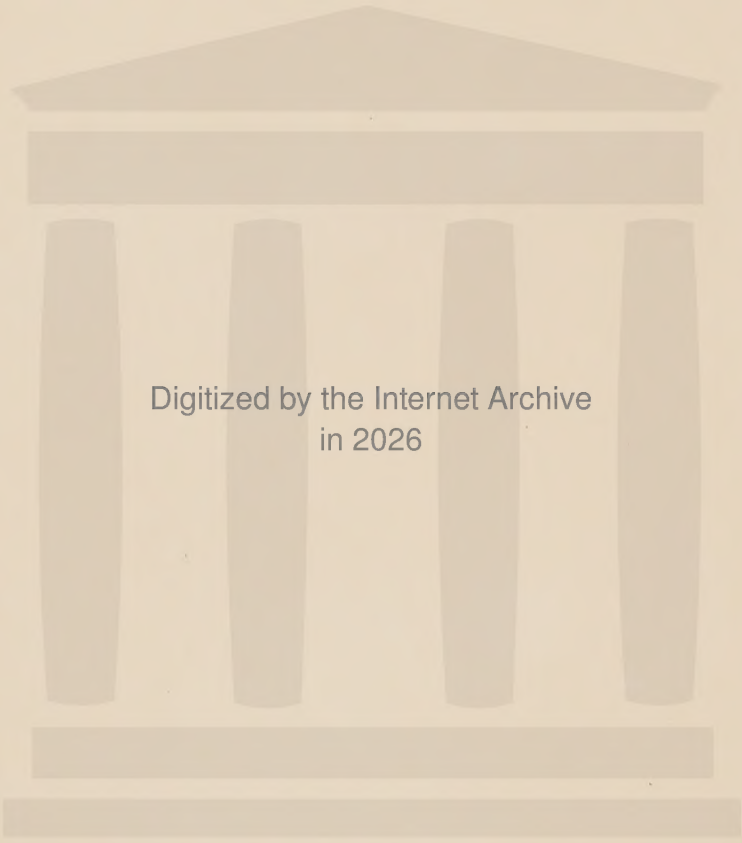

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

THE KING *v.* BRAITHWAITE AND OTHERS.

1917
Oct. 22.

Local Government—General District Rate—Summons for Non-payment of Rate—How Service of Summons to be effected—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 256, 267—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1.

By s. 256 of the Public Health Act, 1875, "If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due . . . . any justice may summon the defaulter to appear before a court of summary jurisdiction to show cause why the rate in arrear should not be paid."

By s. 267, "Notices orders and any other documents required or authorised to be served under this Act may be served by delivering the same to or at the residence of the person to whom they are respectively addressed."

By s. 1 of the Summary Jurisdiction Act, 1848, "Every such summons"—that is to say, every summons issued by a justice under that Act—"shall be served . . . . upon the person to whom it is so directed, by delivering the same to the party personally, or

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by leaving the same with some person for him at his last or most usual place of abode" :—

Held: 1. That a summons for non-payment of a general district rate is an "other document" within the meaning of s. 267 of the Public Health Act, 1875;

2. That for the purposes of the service of such a summons the ratepayer's place of business is to be treated as his "residence" within the meaning of that section, although he does not sleep there; and

3. That service of such a summons at his place of business under that section will be good, notwithstanding the provisions of s. 256 of that Act and of s. 1 of the Summary Jurisdiction Act, 1848, under the latter of which it has been held that a man's place of business at which he does not sleep is not his "place of abode."

Reg. v. *Mead* [1894] 2 Q. B. 124 and *Newport Corporation* v. *Lang* (1892) 57 J. P. 199 followed.

CERTIORARI to quash an order of justices for payment of a general district rate.

The applicant, Major Dowling, was before the war in practice as a solicitor in Bishop Auckland, where he owned two adjoining houses, one of which he used as his dwelling-house and the other as his office. The two houses had no internal communication, and were separately rated. In April, 1915, the applicant, who had then joined His Majesty's forces, closed the dwelling-house, leaving it, except for the furniture, wholly unoccupied, but his clerk continued to carry on his business in the adjoining house. In October, 1916, a general district rate was made by the Bishop Auckland Urban District Council for the half-year ending March 31, 1917, to which rate the applicant was assessed in respect of his dwelling-house in the sum of 2*l.* 8*s.* 9*d.*, and that sum was duly demanded of him. The applicant refused to pay the rate. He knew that he was legally liable to pay it, but thought that he ought not to be required to do so as long as he was serving with His Majesty's forces. On February 20, 1917, a summons was issued for non-payment of the rate, and Major Dowling being then in France, and his dwelling-house being unoccupied, the summons was served by a constable leaving it at his office with a Mr. Graham, who was his managing clerk. Mr. Graham wrote to inform Major Dowling of the summons, but the letter did not reach him until after the return day, and as he did not appear the justices made an order in his absence for payment

of the rate. Major Dowling then obtained a rule for a certiorari to bring up that order as having been made without jurisdiction on the ground that the service of the summons was insufficient, it having been served at his place of business instead of at his place of abode.

G. F. Mortimer, for the district council, showed cause. It is admitted that if a summons for non-payment of a general district rate has to be served in the manner provided by the Summary Jurisdiction Act, 1848, the service in this case was bad, for upon the authorities as they now stand a man's place of business is not his place of abode for the purposes of service under that Act. But the mode of service provided by that Act is superseded by s. 267 of the Public Health Act, 1875, which provides that "notices orders and any other documents required or authorised to be served under this Act may be served by delivering them to or at the residence of the person to whom they are respectively addressed." It has been held, in *Reg.* v. *Mead* (1), that the words "other documents" include summonses; and the cases of *Mason* v. *Bibby* (2) and *Newport Corporation* v. *Lang* (3) are authorities that for the purposes of the service of a notice or summons under the Public Health Act a man's place of business may be regarded as his abode or residence, for it is the place where he is likely to be found. If service had to be effected under the Summary Jurisdiction Act, then in such a case as the present the summons could not be served at all, for there was no person living in the dwelling-house with whom it could be left.

Siney, in support of the rule. The summons ought to have been served by leaving it at Major Dowling's dwelling-house as soon as some person could be found on the premises with whom to leave it. For by s. 256 of the Public Health Act, where a person fails to pay a general district rate when due a justice "may summon the defaulter to appear before a court of summary jurisdiction," and the words "may summon" must mean in the usual manner as provided by s. 1 of the Summary Jurisdiction Act—that is to say, "by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of

(1) [1894] 2 Q. B. 124. (2) (1864) 28 J. P. 121.
(3) 57 J. P. 199.

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abode." In *Rex* v. *Lilley* (1) it was held that service of a summons under that Act for an offence against the Sale of Food and Drugs Act was bad by reason of the summons being left at the defendant's shop instead of at the place where he lived. Ridley J. there said: "I think 'place of abode' means place of residence." That case was followed in *Rex* v. *Rhodes* (2), where the summons was for an offence against the Cinematograph Act. The mere fact that there is no one on the premises at the time is no reason why the mode of service provided by the Summary Jurisdiction Act should not be followed. The words "other documents" in s. 267 of the Public Health Act do not include a summons. The case of *Reg.* v. *Mead* (3) should not be followed. By s. 267, "notices orders and other documents" may be served in a variety of ways, amongst others "by post by a prepaid letter." But there are many offences created by the Public Health Act for which a man may be sent to prison. If, therefore, a summons is a "document" within that section and a man is summoned through the post by a letter which never reaches him, he may be convicted and sent to prison without having had any opportunity of defending himself, a result which can never have been intended.

DARLING J. I think this rule should be discharged. If the mode in which the service upon the applicant was effected was wrong the result would be that he could not be served at all, for he was abroad, and there was no one at his private house with whom the summons could be left. The case of *Reg.* v. *Mead* (3) is a direct authority that a summons is included in the words "notices orders and any other documents" in s. 267 of the Public Health Act, 1875. That being so, the only question is whether the summons was served at the applicant's "residence" within the meaning of that section. The cases of *Mason* v. *Bibby* (4) and *Newport Corporation* v. *Lang* (5) seem to establish that for the purposes of service under the Public Health Act a man's office or place of business is his "abode" or "residence." The former of those cases was decided under s. 150 of the Public Health Act, 1848, in which the expression

(1) (1910) 104 L. T. 77, 78.
(2) (1915) 113 L. T. 1007.
(3) [1894] 2 Q. B. 124.
(4) 28 J. P. 121.
(5) 57 J. P. 199.

used is "place of abode," the latter under the section which is now before the Court. If there is any difference between those two expressions "residence" would seem to be the wider of the two. As both points are covered by authority the rule must be discharged.

AVORY J. I am of the same opinion. The whole question is whether the service should have been effected in accordance with s. 1 of the Summary Jurisdiction Act, 1848, or whether it is enough if it was in accordance with s. 267 of the Public Health Act, 1875. If it required to be under the former I have no doubt that, having regard to the construction that has been put upon the expression "place of abode" in that Act, the service would have been bad. But the case of *Reg.* v. *Mead* (1) is a direct authority that a summons for a default under the Public Health (London) Act, 1891, is a notice or "other document" within the meaning of s. 128 of that Act, which is in identical terms with s. 267 of the Act of 1875. In that case the summons was against the owner of premises for suffering a nuisance to exist upon them, but I do not think that any distinction can be drawn for this purpose between such a summons and one for non-payment of a general district rate. When you have arrived at the conclusion that the summons may be served in the manner pointed out by s. 267 the only question remaining is whether it was served at the applicant's residence. The cases of *Mason* v. *Bibby* (2) and *Newport Corporation* v. *Lang* (3) are clear authorities that the expressions "place of abode" and "residence" in the Public Health Acts include the place where a man carries on his business. Speaking for myself, I regret that a different interpretation should have been put upon the expressions "abode" and "residence" under the Public Health Acts from that which has been put upon the expression "abode" under the Summary Jurisdiction Act, but we must give effect to the interpretation which has been put upon them under the Public Health Act, and according to it the service in this case was good.

SANKEY J. We are bound by the cases of *Reg.* v. *Mead* (1) and *Newport Corporation* v. *Lang.* (3) Those cases are indistinguishable

(1) [1894] 2 Q. B. 124. (2) 28 J. P. 121.
(3) 57 J. P. 199.

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from the present; therefore I agree that the rule must be discharged.

Rule discharged.

Solicitors for district council: *Corbin, Greener & Cook, for J. T. Proud & Son, Bishop Auckland.*

Solicitors for applicant: *J. & C. Dodd, for J. Dowling, Bishop Auckland.*

J. F. C.

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Oct. 12, 16.

THE KING *v.* GARRETT.

Ex parte DE DRYVER.

Criminal Law—Indictable Offence—Power of Metropolitan Police Magistrate to remand Accused on Bail for more than Eight Days—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *s.* 36—*Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *s.* 21—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 24, 54, 55—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 20.

The power given to a metropolitan police magistrate by s. 36 of the Metropolitan Police Courts Act, 1839, to remand on bail, without any limit of time, a person charged before him with felony or misdemeanour has not been cut down by s. 21 of the Indictable Offences Act, 1848, ss. 24, 54, or 55 of the Summary Jurisdiction Act, 1879, or s. 20 of the Criminal Justice Administration Act, 1914.

Semble (*per* Avory J.), that s. 21 of the Indictable Offences Act, 1848, in limiting to eight days the period to which an accused person may be remanded by justices, is dealing only with the case where the accused is remanded in custody.

RULE NISI for a mandamus directed to Mr. Garrett, one of the metropolitan police magistrates, and to one Charles Aughuet calling upon them to show cause why the magistrate should not proceed to hear and determine an information preferred by Raymond De Dryver against Aughuet for having on July 31, 1917, at India House, Kingsway, London, unlawfully and feloniously attempted to murder him.

De Dryver and Aughuet were both Belgian subjects and Belgian soldiers who were both in London, when, as was alleged by De Dryver, Aughuet shot and wounded him. At first De Dryver expressed a

wish not to prosecute Aughuet in this country, stating that the matter could be tried more satisfactorily before the Belgian military authorities, and he desired to avoid the publicity of proceedings in this country. It was also desired by the Belgian military authorities that the trial should take place before a Belgian court-martial, and in the particular circumstances the authorities in this country agreed that this was a proper course to be adopted. When De Dryver came out of hospital, however, he decided to take proceedings against Aughuet in this country, and accordingly he preferred an information with the view of having him committed for trial. Mr. Garrett, the magistrate before whom the matter came, was informed of the whole of the circumstances, and he decided not to proceed at once to hear the case, but to adjourn it to await the result of the proceedings before the court-martial at Calais. He accordingly adjourned the hearing for six weeks, accepting the recognizance of Aughuet, together with a surety, to appear on November 2. Thereupon the present rule was obtained on the grounds that the magistrate had failed to exercise a proper discretion in adjourning the proceedings, and that he had no power in law to adjourn the proceedings for more than eight days.

In his affidavit the magistrate stated that in adjourning the hearing for six weeks he acted under all his powers, and in particular under the power given to him by s. 36 of the Metropolitan Police Courts Act, 1839 (1), and that under that section it had been his practice for eighteen years, and to his knowledge the practice of other metropolitan police magistrates, to suffer persons charged with either felony or misdemeanour to go at large upon recognizance for appearance at such a period of time as the justice of the case seemed to require without any reference to the limit

(1) Metropolitan Police Courts Act, 1839, s. 36: "Any one of the said magistrates, if he shall think fit, may remand any person for further examination, or may suffer to go at large any person who shall be charged before him with any felony or misdemeanour upon his personal recognizance (with or without sureties); and every such recognizance shall be conditioned for the appearance of such person before the same or some other of the said magistrates, for further examination . . . . at a day and place to be therein mentioned; and the magistrate shall be at liberty from time to time to enlarge every such recognizance to such further time as he shall appoint . . . ."

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of eight days mentioned in s. 21 of the Indictable Offences Act, 1848.

Sir Frederick Smith, A.-G., and *Branson* showed cause. (1) The power admittedly given by s. 36 of the Metropolitan Police Courts Act, 1839, to metropolitan police magistrates to remand on bail for an indefinite period persons accused of felony or misdemeanour has not been affected by subsequent legislation. Sect. 21 of the Indictable Offences Act, 1848, which empowers justices to remand for a period not exceeding eight days, has no application in the case of metropolitan police magistrates, for the same statute expressly enacts that nothing therein contained is to alter or affect any of the powers contained in the Act of 1839: see s. 29. Nor is there anything in the Summary Jurisdiction Act, 1879, or in s. 20 of the Criminal Justice Administration Act, 1914, which limits the powers in this respect of a metropolitan police magistrate. Sect. 20, sub-s. 2, of the Act of 1914 amends s. 21 of the Indictable Offences Act, 1848, and, like that Act, it does not touch the metropolitan police magistrate's powers. No mention of the Act of 1839 is made in the list of repealed enactments contained in the Fourth Schedule to the Act of 1914; and if it had been intended to interfere with the long-established practice of metropolitan police magistrates in this matter the Legislature would have done so in the obvious manner, namely, by repealing the material provision of s. 36 of the Act of 1839.

Patrick Hastings, in support of the rule. The Act of 1839 undoubtedly gave power to metropolitan police magistrates to remand on bail a person charged with felony or misdemeanour for a period not limited to eight days. That power was not cut down by the Indictable Offences Act, 1848, but it has been cut down by the Summary Jurisdiction Act, 1879, and the Criminal Justice Administration Act, 1914. Sect. 24 of the Act of 1879, which empowers a Court of summary jurisdiction—this term includes a metropolitan police magistrate's court (see s. 13, sub-s. 11, of the Interpretation Act, 1889)—to remand for indictable offences which may

(1) The argument is confined to the point in reference to the power of the magistrate to remand the accused on bail for more than eight days.

be dealt with summarily, provides by sub-s. 2 that " a person may be remanded under this section in like manner in all respects as a person accused of an indictable offence may be remanded under section twenty-one [of the Indictable Offences Act, 1848], with this addition, that where he is remanded to the next practicable sitting of a petty sessional court he may be remanded for more than eight days." The effect of that provision is to alter the powers of a metropolitan police magistrate and to put him in precisely the same position with regard to remands as other justices. Further, by s. 54 of the Act of 1879 it is enacted that the provisions of ss. 33 and 34 of the Summary Jurisdiction Act, 1848, " as to the Acts relating . . . . to the powers of justices within the metropolitan police district, shall not apply to or restrict the operation of this Act." That is an enactment inconsistent with the preservation of the power given as to this matter by s. 36 of the Act of 1839. Moreover, that section, as being inconsistent with the Act of 1879, is repealed: see s. 55 of the Act of 1879. This result is made even more clear when s. 20, sub-s. 2, of the Criminal Justice Administration Act, 1914, is considered. That sub-section enacts that " the period for which a court of summary jurisdiction may remand on bail a person accused of an indictable offence may, if that person and the prosecutor consent, exceed eight days, and accordingly in section twenty-one of the Indictable Offences Act, 1848, after the words ' not exceeding ' where they first occur in that section, there shall be inserted the words ' unless the person remanded and the prosecutor consent.' " Clearly that section is inconsistent with the power of remand unlimited as to time given by s. 36 of the Act of 1839.

DARLING J. having stated the facts and come to the conclusion that the magistrate had not declined jurisdiction, but that he was in the particular circumstances of the case entitled, in the exercise of his discretion, to adjourn the hearing of the information, continued as follows: It has been contended by Mr. Hastings that the magistrate had no power to adjourn the hearing for more than eight days at the most. By s. 36 of the Metropolitan Police Courts Act, 1839, metropolitan police magistrates are excepted from the limitation placed in this matter upon other justices, and in my

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Darling J.

opinion none of the subsequent legislation to which we have been referred has in any way altered the effect of s. 36. In adjourning the case for more than eight days the magistrate only did that which metropolitan police magistrates have for more than forty years been accustomed to do, and in my view he was clearly acting within his legal powers. The rule must be discharged.

AVORY J. having dealt with the first point and held that the magistrate had not declined jurisdiction, said: A second point has been taken, namely, that the magistrate exceeded his powers in remanding the accused for six weeks; in other words, it is said that the magistrate had no power to remand the accused for more than eight days. As appears from the text-books, it has for many years been in doubt whether s. 21 of the Indictable Offences Act, 1848, applies to a case where an accused person is remanded on bail and not in custody. Sect. 21 says that "if, from the absence of witnesses, or from any other reasonable cause, it shall become necessary or advisable to defer the examination or further examination of the witnesses for any time, it shall be lawful to and for the justice or justices before whom the accused shall appear or be brought, by his or their warrant, from time to time to remand the party accused for such time as by such justice or justices in their discretion shall be deemed reasonable, not exceeding eight clear days, to the common gaol or house of correction, or other prison." Pausing there, it appears to be clear that the limitation of the eight days applies only to the case where the accused is remanded in custody to the common gaol or other prison. In a later part the section says: "Provided also, that, instead of detaining the accused party in custody during the period for which he shall be so remanded, any one justice of the peace before whom such accused party shall so appear or be brought as aforesaid may discharge him, upon his entering into a recognizance with or without a surety or sureties, at the discretion of such justice, conditioned for his appearance at the time and place appointed for the continuance of such examination." The only difficulty in saying that that section has no application to the case where the accused is remanded on bail is that in the latter part of it it uses the words "instead of detaining the accused party in

custody during the period for which he shall be so remanded," and those who take the view that the section applies equally to the case of an accused on bail say that the period for which he shall be so remanded is limited even there to the eight clear days. I express no concluded opinion upon this point so far as the section applies outside the metropolis ; it is unnecessary to do so in this case, but for what it is worth I may say that my opinion, although, I repeat, it is not a concluded opinion, is that the section only applies where the accused is remanded in custody. In this case the question for our decision is whether that has any application in the metropolitan police courts. I think it is quite clear, as the magistrate has said, that s. 36 of the Act of 1839 empowers metropolitan police magistrates to remand on bail for a period exceeding eight days a person who is accused of an indictable offence, and in my opinion there is nothing in any of the subsequent legislation to which we have been referred which either expressly or by implication repeals the express power given by s. 36. With the exception of the provisions of the Criminal Justice Administration Act, 1914, every section of the various Acts which has been cited to us recognizes the right given by s. 36 to metropolitan police magistrates in this respect and recognizes that s. 36 is still in force. Sect. 24 of the Summary Jurisdiction Act, 1879, empowers Courts of summary jurisdiction to deal summarily with certain indictable offences, and it provides that " a person may be remanded under this section in like manner in all respects as a person accused of an indictable offence may be remanded under section twenty-one of [the Indictable Offences Act, 1848], with this addition, that where he is remanded to the next practicable sitting of a petty sessional court he may be remanded for more than eight days." That section clearly applies to the accused being remanded in custody, and it empowers the justices in certain circumstances to remand him in custody for more than eight days. We have been referred also to s. 54 of the same Act, which enacts, inter alia, that " the provisions contained in sections thirty-three and thirty-four of the Summary Jurisdiction Act, 1848, as to the Acts . . . . relating to the powers of justices within the metropolitan police district, shall not apply to or restrict the operation of this Act." So far from that amounting to any restriction or limitation of the

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AVORY J.

powers of metropolitan police magistrates, it in effect provides that if there are any new powers given to magistrates by this Act of 1879 nothing in that Act shall deprive metropolitan police magistrates of any of their powers. If anything, it enlarges the powers of metropolitan police magistrates. Finally, we were referred to s. 20 of the Criminal Justice Administration Act, 1914, and this, in my opinion, is the only section which creates any difficulty in the decision of this question. The difficulty which on the face of it is created arises principally from the fact that the draftsman had not in his mind the provisions of the Metropolitan Police Courts Act, 1839. Sect. 20, sub-s. 2, says: "The period for which a court of summary jurisdiction may remand on bail a person accused of an indictable offence may, if that person and the prosecutor consent, exceed eight days, and accordingly in section twenty-one of the Indictable Offences Act, 1848, after the words 'not exceeding' where they first occur in that section, there shall be inserted the words 'unless the person remanded and the prosecutor consent.'" I think it is quite possible that this provision is intended to operate only where the Court of summary jurisdiction is dealing summarily with an indictable offence; but, quite apart from that point, it is clear, looking at the repealing section of the Act of 1914, that there is no trace of any intention to repeal the provisions of the Act of 1839, so far at all events as concerns s. 36. In my opinion there is nothing in s. 20 of the Act of 1914 which in any way limits or deprives a metropolitan police magistrate of the powers given him by s. 36 of the Act of 1839. A metropolitan police magistrate has still, therefore, power to remand on bail for a period exceeding eight days a person who is accused of an indictable offence; the magistrate may remand the accused in such a case for such period as, in the exercise of his judicial discretion, he may think reasonable. I agree that the rule should be discharged.

SANKEY J. I agree.

Rule discharged.

Solicitors for De Dryver: *Engall & Crane.*
Solicitor for Crown: *Director of Public Prosecutions.*

J. S. H.

ATTORNEY-GENERAL *v.* McLEOD.

1917
Oct. 19, 26.

Revenue—Entertainments Duty—Charitable Institution—Festival consisting of Dinner and Concert—Expenses paid by Stewards—"Payments for admission to any entertainment"—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 4, 5, 6.

By s. 1, sub-s. 1, of the Finance (New Duties) Act, 1916, there is to be paid on all payments for admission to any entertainment as defined by the Act "an Excise duty (referred to as 'entertainments duty') . . . ." By sub-s. 3 entertainments duty is to be charged in respect of each person admitted for payment. By sub-s. 4, where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription to any society the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners of Customs and Excise are of opinion that the payment of a lump sum represents payment for other privileges, rights, or purposes besides the admission to an entertainment, the duty is to be charged on such an amount as appears to the Commissioners to represent the right of admission to the entertainment. By sub-s. 5 entertainments duty shall not be charged on payments for admission to any entertainment where the Commissioners are satisfied that the whole of the takings thereof are devoted to philanthropic or charitable purposes without any charge on the takings for any expenses of the entertainment. By sub-s. 6 the expression "entertainment" includes any performance to which persons are admitted for payment.

A charity consisted of a school where sons of Freemasons could be educated at the charge of funds contributed or collected by stewards who were Freemasons, and to assist in the raising of the funds there was held annually a festival consisting of a dinner followed by a concert. At the festival the amount of donations and subscriptions which had been procured was announced by the stewards. The sum so collected was devoted exclusively to the funds of the charity, and for that reason the expenses of the festival were borne by the stewards and persons participating in it. Stewards not attending the festival contributed the sum of one guinea, and no question arose with regard to that contribution. But stewards and other persons attending the festival (962 in number) contributed a further guinea each, and in respect of the guineas so paid the Crown claimed entertainments duty under s. 1, sub-s. 1, of the Act. It was conceded by the Crown that the dinner apart from the concert was not an entertainment within the meaning of the Act. The cost of the dinner, including establishment charges attributable in some degree to the concert as well as to the dinner, was upwards of 1000*l.* Certain considerable items for

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printing and expenses generally also had to be apportioned between various parts of the festival, including the dinner and concert. The cost of the music at the concert was approximately 30*l.* After a point in the after-dinner proceedings the concert was held in a room or hall different from the dining-hall, where the speeches were continued concurrently with the progress of the concert. All attending the dinner had the right of admission to the concert, but might please themselves whether they preferred the music or speeches, or a selection of each. The dinner was the main part of the proceedings, the concert being a subsidiary and separate, but at the same time important, part:—

Held, upon these facts, that the concert must be regarded as an essential part of the festival and as a part separate and distinct from the dinner, and that the expenditure upon the concert could not be looked upon as negligible; that as the guinea was a lump sum paid in the expectation that it would secure admission to a concert, and it did in fact secure such admission, entertainments duty was payable, it being for the Commissioners to determine under s. 1, sub-s. 4, what portion of the lump sum represented the right of admission to the concert.

INFORMATION by the Attorney-General, on behalf of the Crown, claiming that the defendant was indebted to His Majesty in the sum of 96*l.* 4*s.* for entertainments duty payable by him, being duty in respect of payments for admission to an entertainment at premises known as the Connaught Rooms, Freemasons' Hall, London, on June 21, 1916.

The following statement of the facts, arguments, and material sections of the Finance (New Duties) Act, 1916, is taken from the judgment of the learned judge:—

"By means of an information dated June 22, 1917, the Attorney-General, on behalf of the Crown, sues the defendant, Mr. McLeod, for 96*l.* 4*s.* for entertainments duty. The claim arises by virtue of the provisions of the Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), being 'An Act to impose duties in respect of admission to Entertainments, Matches, Table Waters and other Beverages, and Cider; and for purposes connected therewith.' The section of the Act dealing with entertainments duty is s. 1, and by sub-s. 1 of that section it is provided as follows: 'There shall, as from the fifteenth day of May, nineteen hundred and sixteen, be charged, levied and paid on all payments for admission to any entertainment as defined by this Act an Excise duty (in this Act referred to as "entertainments

duty ") at the following rate ' ; and then the rates run from ½*d.* on a ticket which does not exceed 2*d.* to 1*s.* on a ticket up to 12*s.* 6*d.*, and then 1*s.* for every 10*s.* after that amount.

" It is to be observed that the duty is in no sense a tax upon the profits of the entertainer, but upon the expenditure or payment made by the person entertained for the purpose of securing the right to be so entertained. Accordingly, by sub-s. 2 provision is made for payment of the duty by stamps upon admission tickets unless arrangements are made which otherwise secure payment of the duty. Sub-s. 3 provides that in case of admission otherwise than by stamped ticket the duty shall be recoverable from the proprietor, and by virtue of sub-s. 6 ' the expression " proprietor " in relation to any entertainment includes any person responsible for the management thereof.' The same sub-s. 6, which is a defining subsection, enacts that ' the expression " entertainment " includes ' any performance or amusement ' to which persons are admitted for payment ; and the expression " admission to an entertainment " includes admission to any place in which the entertainment is held ; ' and, further, that ' " admission " means admission as a spectator or one of an audience.'

Sub-s. 4 of s. 1 is of great importance in this case, and is an entirely natural provision having regard to the scheme of the duty as a duty, not upon profits, but upon expenditure, and having regard to the not uncommon practice whereby persons combine to share expenses and to jointly make provision for their mutual entertainment without any view to pecuniary profit. That sub-section provides amongst other things as follows :—

" ' Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society . . . . the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . . the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable.'

" The Commissioners referred to are the Commissioners of Customs

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and Excise (see s. 8 of the Act). They are the persons charged with the management and collection of the duty. It only remains in considering the Act to observe that by virtue of sub-s. 5 of s. 1 the duty is not payable where the whole of the takings of an entertainment without deduction for expenses are devoted to philanthropic or charitable purposes, and that the duty, though paid, is repayable if the net proceeds of an entertainment are devoted to those purposes in cases where the expenses do not exceed 20 per cent. of the receipts.

"The case came on for hearing before me sitting with a special jury on October 22, 1917, but, as the facts were substantially not in dispute, the jury was by consent discharged. The defendant and those acting with him have, as the advisers of the Crown freely admit, given every assistance and information necessary for the elucidation of the facts for the determination of the questions as to liability and amount arising from those facts. Two witnesses were called for the defendant to explain matters, but the evidence was mainly that of documents and letters. From those materials I find the facts to be as follows: There was founded in 1798, and now exists, a charity of a most beneficent character, known as the Royal Masonic Institution for Boys, being a school where sons of Freemasons may be educated at the charge of funds contributed or collected by Freemasons. Of that institution the defendant is secretary. In order to assist in the raising of such funds there is held annually what is known as the 'Anniversary Festival.' Shortly stated, the scheme for the conduct of the festival is that brethren and certain ladies and 'Lewises' are invited to become stewards, and to procure donations and subscriptions before and at the festival. The amount is announced at the festival itself. The actual festival consists of a dinner followed by a concert, and on the occasion now in question it was held on June 21, 1916, at the Freemasons' Hall. The total amount collected in this way is devoted exclusively to the funds of the charity, but for that very reason the expense of the festival is borne by the stewards and persons participating therein, A steward who does not attend the actual festival contributes one guinea to the expenses, and no question now arises in respect of this contribution; but a steward who does attend contributes a further guinea, and ladies and 'Lewises' attending pay the same sum. Nine hundred and sixty-two persons attended the festival on June 21, 1916,

and it is in respect of the payments by those persons of one guinea a head that duty is claimed at the rate of 2*s.*, in accordance with sub-s. 1 of s. 1 of the Act.

"It is necessary to add that no question as to the proper party to be sued arises here, since it was agreed that if legal proceedings were taken they should be taken against Mr. McLeod, who, besides being secretary of the institution, acts as honorary secretary to the stewards. There is a festival committee of some twelve or thirteen persons who in practice make all arrangements for the festival, and in my judgment the members of the committee, apart from the agreement as to parties above referred to, would be the persons, if any, liable for the duty in the present case, they being the persons responsible for the management of the festival and of such part of the festival, if any, as is an entertainment.

"Before dealing with the real issue between the parties one matter should be cleared away. In certain correspondence with regard to the liability for tax the point was urged that no duty was payable by virtue of the exemption in favour of charities above referred to (sub-s. 5). But Sir Ernest Pollock, in his able argument on behalf of the defendant, rightly disclaimed reliance upon this point. In respect of the sum of over 35,000*l.* collected by the stewards and devoted to the funds of the charity there is, I need hardly say, no claim for duty. On the other hand, with regard to the sums in respect of which duty is claimed, these are not devoted to charity. A charitable object, no doubt, is the occasion of the festival, but the stewards' contributions are devoted, not to the charity, but to the expenses of the festival, and as to a balance of some 400*l.* to 500*l.* it was on this occasion, by vote of the stewards, distributed by way of benefit to the secretary and office staff of the institution.

"The substantial question for my decision is: Was the festival, or any part of it, an entertainment, and was any, and if so what, sum paid for admission to an entertainment or to a place of entertainment?

"It was conceded by the Solicitor-General, who opened the case on behalf of the Crown, that a dinner is not an entertainment within the meaning of the Act, because even if it might be described as an amusement, yet a person admitted to the dinner is

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not so admitted as a spectator, or one of an audience, and accordingly is not within the ambit of the Act.

"But it was contended on behalf of the Crown :—

"(1.) That an integral or important part of the festival was a concert, and that accordingly the festival was an entertainment ; that the several sums of one guinea were paid for admission to such entertainment, and either are not capable of division and allocation to various matters, such as the dinner and the concert, or ought not to be divided and so allocated. Mr. Giveen, in his very forcible reply for the Crown, laid special stress upon the further fact that the whole festival took place in one building ; that the tickets issued in consideration of the payment of one guinea were tickets of admission to that building on the occasion in question ; and that accordingly the payments were made for admission to the place in which the entertainment was held within sub-s. 6 of s. 1 of the Act.

"(2.) That if, contrary to the above contention, the duty was not chargeable and estimable upon the whole sum of one guinea, yet sub-s. 4 applied, and the duty must be paid on the lump sum of one guinea, leaving it to the Commissioners to decide on what amount or part of the one guinea duty should ultimately be charged and retained.

"On behalf of the defendant it was contended that duty was not payable on the basis of either of the contentions of the Crown ; that the concert was a mere incident annexed to the holding of the dinner, which was the essential part of the festival ; that there was no contract or obligation upon those who managed the festival to provide any concert in return for the payments made ; that the payments were made primarily, or, indeed, exclusively, for the dinner, and that the expense of the concert was insignificant and really negligible.

"The matter as between these various contentions is not easy of decision, and the decision depends upon a consideration of certain other facts beyond those already set out. Such further facts are as follows : There is published annually in connection with the institution a report in book form in which is to be found at p. 71 of the 1916 issue under the heading of 'Expenses attending Stewardship' the following statement :—

"'The total amount collected at the Festivals of this Institution

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being exclusively directed to the funds of the Charity, the Stewards (irrespective of their individual donations to the Institution) are called upon for certain expenses incidental to the Festival; but this liability is limited to a sum fixed upon by the Stewards at their first meeting, and which will probably not exceed two guineas for Brethren, and half that amount for Ladies, and Lewises *being Minors*. The purposes for which the amount is required are: The musical arrangements for the entertainment of the guests; the necessary charges for postage, printing, stationery, Stewards' favours, &c. It also includes the price of the Stewards' dinner ticket.'

"It appears that formerly the musical part of the festival took place in the actual dining-hall, being interpersed with speeches, but that it was found more pleasant and convenient to separate the functions, in the sense that after a point in the after-dinner proceedings the concert was held in a room or hall different from the dining-hall, where the speeches were continued concurrently with the progress of the concert. All attending the dinner have the right of admission to the concert, but may, of course, please themselves as to whether they prefer music or speeches, or a selection of each. Count was kept in 1916 of the 962 persons or thereabouts attending the festival. The number of entrances into the concert-hall was 623, but probably a number of persons went in and out of the concert-hall more than once and therefore were counted more than once.

"It was obvious, however, that the concert was a substantial attraction to a large proportion of those attending the festival, and it was announced as such in various notices of the festival—a typical one announcing that 'A Concert by artists of known repute will take place in the Temple of Grand Lodge after the Banquet.'

"The programme of the festival in book form must also be referred to in this connection. At pp. 12 and 13 are the menu of the dinner and the list of toasts, and at pp. 15 to 23 are the concert programme and book of words. Dinner and concert seem alike to have been of an attractive character.

"The accounts of the festival were produced and commented upon by both sides. The figure under the item dinner accounts was 1030*l.* 12*s.* 5*d.*; under the item of music 31*l.* 10*s.* The latter was for payments to such of the musical performers as were paid. The

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former figure was mainly no doubt attributable to the actual cost of the dinner, but I gather partly also to what may be called establishment charges for the occasion attributable to the concert in some degree as well as to the dinner. Certain considerable items for printing and expenses generally would also have to be apportioned as between various parts of the festival, including the dinner and the concert."

Sir Gordon Hewart, S.-G., and *Giveen*, for the Crown.

Sir Ernest Pollock, K.C., and *C. J. Conway*, for the defendant.

The arguments sufficiently appear from the statement set out above.

Cur. adv. vult.

Oct. 26. The following judgment was read by

ROCHE J., who, after stating the facts, arguments, and material portions of the Finance (New Duties) Act, 1916, as set out above, continued: On these facts I am unable to accede to the first and main contention of the Crown.

It appears to me that to treat the concert as so colouring and changing the nature of the festival as to make it one musical entertainment or an entertainment to be treated as one whole is to ignore the real facts. I am satisfied that the dinner was the main part of the proceedings and that the concert was a subsidiary and separate, but at the same time important, part of the proceedings. Nor when it is examined with care does the argument from locality, pressed by Mr. Giveen, appear to carry the case for the Crown further.

In my judgment the place of the concert, which was an entertainment, was different from the place of the dinner, which was not an entertainment, or if the larger building in which both were held is to be regarded and looked to, then the persons who were admitted paid the larger portion of their guinea for admission to the building because it was at one time and in one part a dining-hall and a smaller portion because it was at another time and in another part a concert-hall.

On the other hand, the contention of the defendant, in my opinion, is not supported by the facts. I agree that there may be a dinner

at which there is music of such an incidental character as not to convert the dinner into an entertainment, but in my judgment this is not such a case. It follows from what I have already stated that I regard the concert as an essential part of the festival and as a part separate and distinct from the dinner. Nor can I regard the expenditure upon the concert as negligible. I observe that the Act deals with admissions to entertainments where the payments are 2*d*. and even lower. The cost of music in this case is small compared with the cost of the dinner, but without taking count of other expenses it amounts to about 8*d*. or 9*d*. per head of those entitled to enjoy it. If a judgment had to be formed as to what part of the guinea would be demanded and paid for the concert as apart from the dinner, supposing they were separated, in my judgment the sum would be somewhere in the neighbourhood of 2*s*. That is not a negligible sum in relation to this duty in this Act of Parliament. The argument for the defendant based on the absence of a contract to provide a concert also in my judgment fails. The language of contract is not apt in connection with these festival arrangements, but, however the matter of contract may stand, I am clearly of opinion that if money is paid in the expectation that it will secure admission to a concert, and it does in fact secure such admission, entertainments duty is payable.

The result, therefore, is that, in my judgment, sub-s. 4 of s. 1 applies, and that a lump sum of one or of two guineas has in this case been paid by 962 persons as a subscription or contribution to an association consisting of the body of stewards, and that in and by means of that lump sum there is made payment for admission to an entertainment, being the concert in question. I have already, for my own purposes, in considering whether such payment is negligible, endeavoured to form and express some opinion as to the approximate amount of the payment for such admission. But it is the function of the Commissioners and not of myself to determine what part of the lump sum represents payment for other privileges, rights, or purposes, and what part represents the right of admission to the concert. I need only add that the number of persons chargeable with duty is in my view rightly taken at 962. I think that right of admission to the concert has to be regarded and is paid for, and that whether any individual steward avails himself of his right is not for

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this purpose material. On this basis the Crown is in these proceedings entitled to recover the sum of 96*l.* 4*s.*

One question only remains—that of costs. The rule no doubt prevails in these cases that the successful party, be it Crown or defendant, receives costs, but it was suggested for the defendant that if the Crown succeeded on the lump sum point and not on the main point argued the result was very different from that contended for, in that the sum which the Crown ought to ultimately receive and retain for its own behoof must be very much smaller than the 96*l.* 4*s.* to which the Crown has throughout claimed to be paid and to retain. This suggestion is, I think, entitled to weight; and partly for this reason, but partly also for a second and different reason which was also mentioned, I think the proper order is that there should be no costs of these proceedings. That second reason is that the question for decision under this recent Act is one of novelty and of some difficulty, and those who represented the Crown expressed themselves as desirous of obtaining a decision upon it as a possible guide in other cases which have arisen or may arise.

There will therefore be judgment for the sum claimed, but without costs.

Judgment for Crown.

Solicitor for Crown: *Solicitor for Customs and Excise.*
Solicitors for defendant: *Stanley J. Attenborough & Co.*

J. E. A.

NYE, APPELLANT *v.* NIBLETT AND OTHERS, RESPONDENTS. 1917 *Oct.* 26.

Malicious Killing of Animals—Animal "ordinarily kept for a domestic purpose"—Whether necessary to prove that the particular Animal was so kept—Or that it was the Property of another Person—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97), *s.* 41.

By s. 41 of the Malicious Damage Act, 1861, "Whosoever shall unlawfully and maliciously kill . . . . any . . . . animal not being cattle, but . . . . being ordinarily kept . . . . for any domestic purpose," shall be guilty of an offence:—

Held: 1. That it is not necessary for the prosecution to prove that the particular animal killed was in fact kept for a domestic purpose if it belonged to a class of animals which are ordinarily so kept; and

2. That it is not necessary to prove the ownership of the animal.

CASE stated by justices of Wiltshire.

The respondents, three boys named Godfrey Niblett, Alec Neal, and Victor Neal, were summoned on an information charging that they had maliciously killed two cats the property of William Smith and Charles Curtis respectively, contrary to s. 41 of the Malicious Damage Act, 1861, which provides that "Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose," shall be guilty of an offence punishable on summary conviction.

It was proved that the boys having found the cats in the neighbourhood of certain farm buildings threw stones at them and chased them into a barn where they killed both cats with a hurdle rail after having transfixed one of them with the tine of a pitchfork. No evidence was called on behalf of the prosecution to prove the ownership of the cats, or to show that they were being kept for domestic purposes. The justices were of opinion that upon the true construction of the section they were, in the absence of such evidence, not entitled to convict, and they accordingly dismissed the information. The prosecutor appealed.

Stuart Bevan, for the appellant. The justices' objection that there was no evidence of the ownership of the cats was immaterial.

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No doubt the title of the Act is "An Act to consolidate and amend the statute laws of England and Ireland relating to malicious injuries to property." But the language of s. 41 is perfectly general; there is nothing in it to suggest that its scope is limited to the protection of property. In the *Law Journal* newspaper for August 4, 1900, at p. 456, there is a note of an anonymous case, which was tried at Chester Assizes before Lord Russell C.J., where a man was charged under s. 40 of the same Act with having maliciously wounded a mare his own property. It was there objected that it was no offence under that Act for a man to injure an animal which was his own property. Lord Russell, after consulting Grantham J., overruled the objection. There is appended to the note the following criticism: "This ruling may be justified by the generality of the words of the section, but is certainly not in accordance with the view hitherto prevalent as to the scope of the Act of 1861, which is aimed at malicious injuries to the property of others; and if the law was as now laid down there does not seem to have been much, if any, need for passing the Prevention of Cruelty to Animals Acts." But the decision has never been overruled. The justices' second objection that there was no evidence that the particular cats were kept for a domestic purpose seems to have been based on the supposition that, for all that appeared to the contrary, they might have been wild cats—that is to say, cats which had taken to the woods and been abandoned by their former owners. But the words "ordinarily kept for any domestic purpose" were mainly intended to refer, not to the particular animal which is the subject of the proceedings, but to the class of animals to which it belongs; and cats as a class are ordinarily kept for a domestic purpose. It may be that the words "ordinarily kept for any domestic purpose" would also include a particular animal which, though not belonging to a class of animals ordinarily kept for such a purpose, was itself so kept, such as a tortoise, which is sometimes kept in a garden for the purpose of destroying insects; but it is only where the animal, which is the subject of the charge, does not belong to such a class that it is necessary to prove that it was kept for a domestic purpose.

No counsel appeared for the respondents.

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DARLING J. The question in this case arises upon facts which are perfectly plain. The boys who were charged had without any kind of justification whatever killed two cats in circumstances of great cruelty. They were charged under s. 41 of the Malicious Damage Act, 1861. [He read the section.] Now the magistrates declined to convict because they were of opinion that they were not entitled to convict without evidence as to the ownership of the cats at the time of the alleged offence, and without evidence that the cats in question were at the time being kept for domestic purposes. I think they were wrong on both points. I read the section as meaning that if you kill unlawfully and maliciously an animal which, though not the subject of larceny, belongs to a class of animals which, as a class, are ordinarily kept in a state of confinement or for domestic purposes, then the offence is committed, and that in such a case it is not necessary to prove who owned the particular animal so killed, or that the particular animal was ordinarily kept in confinement or for some domestic purpose. Here there was no evidence that these were cats which had become wild. They were cats which were haunting farm premises, and belonged to the class of cats which are ordinarily kept for domestic purposes. That being so, they were within the protection of the section. I may add that I think the section goes further, and not only protects animals of a class which are ordinarily kept in a state of confinement or for domestic purposes, but also protects a particular animal which, though not belonging to such a class, is in fact kept in confinement or for a domestic purpose. The appeal must be allowed.

AVORY J. I agree that the justices took a wrong view of the statute in this case. They were of opinion that it was necessary that there should be evidence as to the ownership of the cats and also that the cats were at the time being kept for domestic purposes. I think neither of those conditions is necessary to satisfy the statute. I base my judgment on this, that cats belong to a genus or class of animals that are ordinarily kept for domestic purposes. There is no doubt that that is the usual description of cats. "Domestic cats" is a well-known expression. That being so, it was not necessary to prove that the particular cats in question were at the time being kept for domestic purposes, although in my opinion there was

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evidence in this particular case from which the justices might have inferred that these particular cats were being kept for such purposes. I also agree that there was no need for evidence as to the ownership of the cats, and I think it is probable that all that the justices meant was that if they had had evidence of the ownership that would have been sufficient to show that these particular cats were being kept for domestic purposes. The case must be remitted to the justices with this opinion of the Court.

SANKEY J. I agree in thinking that the case must be sent back.

Appeal allowed.

Solicitor for appellant: *Sydney G. Polhill.*

J. F. C.

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Nov. 6, 7.

REPTON SCHOOL GOVERNORS *v.* REPTON RURAL DISTRICT COUNCIL.

[1917 R. 69.]

Local Government—Building—By-laws—Air Space at Rear of New Building—Reasonableness of By-law—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *s.* 23.

The plaintiffs proposed to build an addition to the front of one of the school boarding-houses consisting of a projection containing three rooms one above the other. The defendants refused to approve the plans as the proposed addition would infringe one of their by-laws, which provided that "every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than one hundred and fifty square feet." The plaintiffs contended that the by-law was unreasonable as it was impossible to provide an open space at the rear of a new building which consisted of an addition to an existing building:—

Held, that the by-law was unreasonable and therefore bad.

ACTION tried by Bailhache J.

In 1916 the plaintiffs proposed to make an addition to the front of one of the school boarding-houses, the addition consisting of a projection three storeys high containing a small room on each floor. This work was commenced by the plaintiffs without plans having been deposited by them with the defendant council. On the demand of the defendants plans were deposited on September 21,

1916, and the execution of the work was suspended soon after that date. By virtue of s. 23 of the Public Health Acts Amendment Act, 1907 (1) (which was in force within the defendants' district), the addition to the house proposed to be made by the plaintiffs was a new building for the purpose of the defendants' by-laws. On September 28, 1916, the defendants refused to approve the deposited plans on the ground that the addition to the house did not comply with their by-laws. These were made in 1902 and were in the model form issued by the Local Government Board. The material by-law was No. 12, which was in these terms: "12. (1.) Every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than one hundred and fifty square feet, and free from any erection thereon above the level of the ground, except a water closet, earth closet, or privy, and an ashpit." "(2.) He shall cause such open space to extend, laterally, throughout the entire width of such building, and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises immediately opposite or adjoining the site of such building, to be not less in any case than fifteen feet." The defendants said that the addition did not comply with the by-law as to the provision of an open space at the rear thereof. The plaintiffs contended that it was impossible to provide an open space at the rear of a new building which consisted of an addition to the front of an existing building, and that the by-law in question which required the provision of an open space in the rear of new buildings was bad as being unreasonable. Except for not showing an open space at the rear, the plans were in accordance with the defendants' by-laws. Correspondence took place between the parties on the subject in which the plaintiffs, maintaining that the by-law being bad for unreasonableness, intimated that they

(1) Public Health Acts Amendment Act, 1907, s. 23: "For the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely:—

. . . . .

"(*d*) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only . . . . shall be deemed to be the erection of a new building."

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proposed to proceed with the work, and in fact they did so. On December 29, 1916, the defendants, acting under their by-law No. 57, served a notice calling upon the plaintiffs to show cause why the addition to the house should not be pulled down and removed, whereupon, after some further correspondence, the plaintiffs issued the writ in this action claiming an injunction restraining the defendants, their servants and agents, from pulling down, removing, or otherwise interfering with the addition to the house.

Hudson, *K.C.*, and *Inman*, for the plaintiffs. By-law 12 became unreasonable and bad when s. 23 of the Public Health Acts Amendment Act, 1907, extended the definition of a new building to include any projection, e.g. a buttress, from an existing building. It is impossible to provide an open space at the rear of an addition to an existing building, and a by-law which necessarily produces an absurd result is bad as being unreasonable. As was pointed out by Avory J. in *Leonard* v. *Hoare & Co.* (1), by-laws sanctioned before the passing of the Act of 1907 (and that is the case here) require consideration and amendment in view of the provisions of that Act. That observation of Avory J. is not affected by the fact that in *Rex* v. *Foot's Cray Urban Council* (2) the actual decision in *Leonard* v. *Hoare & Co.* (1) was overruled.

[BAILHACHE J. Is it necessary that the air space required by by-law 12 should be immediately at the rear of the new building?]

Yes.

Talbot, *K.C.*, and the *Hon. M. M. Macnaghten*, for the defendants. The Legislature had no intention of invalidating these by-laws on passing the Public Health Acts Amendment Act, 1907. What it intended was to remove certain doubts as to the meaning of the expression "new building." The effect of s. 23 of the Act of 1907 is "that such of the building by-laws in force in the district as may be applicable will apply where any of the works enumerated in the section are contemplated, and plans must be submitted and the work executed in accordance with the by-laws accordingly": see Lumley's Public Health, 8th ed., vol. 1, p. 1110. It is contended for the plaintiffs that a mere projection, such as a buttress, would come within the by-law. That is not so. The by-law only applies

(1) [1914] 2 K. B. 798, 802. (2) [1916] 1 K. B. 246.

where it can properly be applied to the particular subject-matter: see *Collins* v. *Greenwood*. (1) Here the building, being in fact the addition of new living rooms, clearly comes within the by-law.

[BAILHACHE J. It may be that one should take the whole building, old and new, and if it is found that there is sufficient air space behind the whole the by-law is complied with.]

That may be the proper construction of the by-law; or it may be that the new part has a front and back by itself. The by-law ought to be supported if possible. As Lord Russell of Killowen C.J. said in *Kruse* v. *Johnson* (2), the by-laws of a public representative body ought to be "benevolently" interpreted.

Hudson, K.C., in reply. A by-law is unreasonable where its enforcement will involve an oppressive or gratuitous interference with the rights of others—*Kruse* v. *Johnson*. (2) The enforcement of the by-law in question will have this effect, and moreover will in no way further the interests of public health in such a case as this. [He also cited *Shiel* v. *Sunderland Corporation*. (3)]

BAILHACHE J. In this case the governors of Repton School were minded to build an addition to the house of one of the masters by adding three rooms to it, one above the other. The defendants, the Repton Rural District Council, objected that the proposed addition constituted an infringement of their by-laws, which are in the model form issued by the Local Government Board. It is conceded by Mr. Hudson on behalf of the governors that by-law No. 12 applies to the proposed new building, but he contends that the by-law is so unreasonable as to be bad.

In considering whether a by-law is good or bad I must approach the question from the standpoint of desiring to support the by-law if it is reasonably possible to do so. This matter was much discussed in *Kruse* v. *Johnson* (2), where the question was as to the validity of a by-law prohibiting singing and the playing of music in any public place. Obviously the considerations applicable in the case of such a by-law are quite different from those which relate to by-laws dealing with buildings; but I think the principle there laid down by Lord Russell of Killowen C.J. is just as applicable to the by-law

(1) (1910) 103 L. T. 36. (2) [1898] 2 Q. B. 91.
(3) (1861) 6 H. & N. 796.

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I have to construe as to that with which he was dealing. He said (1): "When the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered." The phrase "reasonably administered" gives rise to a little difficulty, because the law is clear that a public body is bound to enforce its by-laws, at any rate those which are concerned with matters of public health such as building by-laws, even if their enforcement may create hardship in any particular case; it is not open to local authorities to waive compliance with their by-laws, so that I am not quite sure that I understand what Lord Russell meant when he spoke of by-laws being "reasonably administered." Lord Russell then gave certain illustrations as to unreasonableness in the case of such a by-law as that with which he was dealing, but in the case of building by-laws one is not limited to those given by him; other illustrations may be given. One may certainly add this—that if the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think one would be entitled to say that the by-law was void because it was unreasonable. One must of course be careful to see that the result is such as no one would desire, and would in itself be absurd, but if it is found to be so, then I think one is entitled, and indeed bound, to say that such a by-law is bad for unreasonableness.

In this case the by-law in question applies to new buildings, and the proposed addition to the master's house is now at any rate a new building. Before the Public Health Act Amendment Act, 1907, the addition might not have been a new building, as there is authority for saying that it would be treated merely as an addition to an

(1) [1898] 2 Q. B. 99.

old building, but in view of the language of s. 23 of the Act of 1907 that cannot now be said, and, indeed, something much less than this addition—for example, the alteration of a wall or the making of a projection, is by s. 23 to be deemed to be a new building. The defendants' by-laws were adopted long before 1907, and Mr. Hudson says that although they might have been perfectly reasonable and valid till that year, the Act of 1907 has rendered the particular by-law unreasonable and void. I am not quite sure that I can look at the matter entirely from that point of view, because in the by-laws themselves there is an interpretation clause by which a domestic building is defined as meaning "a dwelling house or an office building, or other out-building appurtenant to a dwelling house whether attached thereto or not, or a shop, or any other building not being a public building, or of the warehouse class." It may be that, apart from the Act of 1907, this proposed addition to the master's house comes within the interpretation clause of the by-laws as a domestic building. If it does it is a new domestic building within by-law 12, and if that is so, and Mr. Hudson is right, this by-law must have been unreasonable from the time it was adopted and is not unreasonable merely because it does not fit the definition of the Act of 1907. Although I am not quite certain that this is a domestic building within the definition clause of the by-laws, I am inclined to think it is, and that makes me all the more careful in considering whether this by-law is bad for unreasonableness. I must consider what in a supposititious case which might reasonably occur the effect of enforcing this by-law might be. Take the case of a house which is surrounded by a park with ample air space, and suppose the owner is minded to increase the size of his dining-room in the front of the house by making it twelve feet wider than before. For that purpose he proposes to throw out a projection from the house to the requisite extent. The projection when made will be a new building, but it will not have behind it the requisite air space which is necessary to comply with this by-law. If I am to treat the by-law as good, it would prevent the owner of the house from doing anything like that, and it would not, in my opinion, be open to the local authority to administer the by-law "reasonably" as suggested by Lord Russell; they would be bound to enforce it. Mr. Talbot says that difficulty may be overcome by calling the front of the dining-room the back

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of it. But it is not open to a local authority to get rid of the difficulty created by the by-law by calling the front of a room the back. If I am to construe this by-law according to its true meaning, it would prevent such an addition to the house as I have supposed an owner desired to make. To allow such an addition to a building would infringe no other provision of the Public Health Acts; it would not be undesirable from any point of view except that it might be unsightly, a matter with which local authorities have as yet no concern. I can see no reason for a by-law which would prevent such a thing being done, and if I find one which does prevent it I think it interferes unjustifiably with the owner's rights for no reason at all. With every desire to support a local authority's by-laws, I come to the conclusion, although with the greatest reluctance, that the by-law in question is unreasonable and void.

What I should have liked to decide is this, that the by-law does not apply where there is ample air space for the new building and the old of which when it is built it will form part, but that it does apply where there is not sufficient air space for the whole structure, new and old taken together. I cannot, however, do this, the words of the by-law being too strong for me. If I could, the effect would be that where there is an old building which has not sufficient air space the local authority cannot interfere with it and order it to be pulled down, but it can refuse to allow any increase of the old building. If I could have treated the by-law in that way I should have upheld it as being eminently reasonable; but, as I have said, I cannot so construe it. The truth of the matter is that since the Act of 1907 this by-law has become unworkable and must be revised. I am told that the Local Government Board has been working at new by-laws since 1907, and it may be that when they are issued they will meet the altered position created by the Act. The plaintiffs are entitled to the injunction claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Ullithorne, Currey & Co., for Barber, Currey & Currey, Derby.*

Solicitors for defendants: *Bridges, Sawtell & Co., for Lowe & Auden, Burton-on-Trent.*

J. S. H.

CHINA MUTUAL STEAM NAVIGATION COMPANY, LIMITED *v.* MACLAY.

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Nov. 12, 13, 15.

[1917 C. 1226.]

War—Shipping—Requisition—Shipping Controller—Duties and Powers—Action against Public Officer in his Official Capacity—Declaratory Judgment—New Ministries and Secretaries Act, 1916 (6 & 7 *Geo.* 5, *c.* 68), *ss.* 5, 6—*Defence of the Realm Regulations, reg.* 39 *BBB.*

By s. 6 of the New Ministries and Secretaries Act, 1916, the Shipping Controller, appointed under s. 5 of that Act, has, inter alia, such powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914. By reg. 39 BBB of the Defence of the Realm Regulations the Shipping Controller may requisition or require to be placed at his disposal any ships in order that they may be used in the manner best suited for the needs of the country and may require any requisitioned ships to be delivered to him at such times and places as he may require.

By a letter addressed to the plaintiffs, who were shipowners, the Shipping Controller purported to requisition the plaintiffs' steamers, but the letter stated that until the plaintiffs were otherwise directed they were to continue to run the vessels as for themselves though actually for the account of the Government, crediting full earnings and debiting net charges.

The plaintiffs brought an action against the Shipping Controller claiming a declaration that, notwithstanding the letter, the voyage of one of their steamers which had commenced after the receipt by the plaintiffs of the letter was for their risk and account, and that they were entitled to retain the profits, if any, of the voyage:—

Held—(1.) that reg. 39 BBB was not ultra vires; (2.) that, inasmuch as the effect of the letter, taken as a whole, was to requisition, not only ships, but also the services of the shipowners, it went beyond the powers conferred on the Shipping Controller by reg. 39 BBB and was ultra vires; (3.) that the action was maintainable against the Shipping Controller; and (4.) that the plaintiffs were entitled to the declaration claimed.

Raleigh v. *Goschen* [1898] 1 Ch. 73 followed.

ACTION in the commercial list tried by Bailhache J. without a jury.

The plaintiffs were the owners of a line of British steamships which were managed by Alfred Holt & Co., and which were regularly employed in trade between the United Kingdom and ports in India, Ceylon, Burmah, Straits, China, Japan, and the Persian Gulf. The

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defendant was the Shipping Controller, appointed under s. 5 of the New Ministries and Secretaries Act, 1916. (1)

On March 5, 1917, a letter, written on behalf of the defendant, was addressed to Alfred Holt & Co., as managers of the plaintiffs' ships. The letter dealt in great detail with the management of the plaintiffs' ships, and it is unnecessary for the purposes of this report to set out its terms in extenso. Its essential features are stated in the judgment, where it is referred to as the order of March 5.

The *Keemun*, which was one of the plaintiffs' ships, started on April 8, 1917, in the ordinary course of her trade, on a voyage from Liverpool to Penang, Singapore, Hong-kong, Shanghai, Nagasaki, Moji, Kobe, and Yokohama laden with a general cargo procured by the plaintiffs.

The plaintiffs claimed in this action a declaration that, notwithstanding the letter of March 5, 1917, written on behalf of the defendant as Shipping Controller, the voyage of the *Keemun* was for the risk and account of the plaintiffs, the owners of the vessel, and that the plaintiffs, as owners, were entitled to receive and retain the profits, if any, of such voyage.

The points of defence alleged that the points of claim disclosed no cause of action against the defendant. Alternatively, the defendant

(1) New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68), s. 5: "For the purpose of organising and maintaining the supply of shipping in the national interests in connexion with the present war, it shall be lawful for His Majesty to appoint a Minister of Shipping under the title of Shipping Controller, who shall hold office during His Majesty's pleasure."

Sect. 6: "It shall be the duty of the Shipping Controller to control and regulate any shipping available for the needs of the country in such manner as to make the best use thereof, having regard to the circumstances of the time, and to take such steps as he thinks best for providing and maintaining an efficient supply of shipping, and for those purposes he shall have such powers or duties of any Government department or authority, whether conferred by statute or otherwise, as His Majesty may by Order in Council transfer to him, or authorise him to exercise or perform concurrently with or in consultation with the Government department or authority concerned, and also such further powers as may be conferred on him by regulations under the Defence of the Realm Consolidation Act, 1914, and regulations may be made under that Act accordingly."

relied upon s. 6 of the New Ministries and Secretaries Act, 1916, and reg. 39 BBB of the Defence of the Realm Regulations (1), and said that he had power at all material times to control and regulate any shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time, and to take such steps as he should think best for providing and maintaining an efficient supply of shipping and to make orders accordingly; that the defendant thought the writing of the letter of March 5, 1917, and the carrying out of its terms by all persons (including the plaintiff company) to whom it might be addressed the best steps to take for providing and maintaining an efficient supply of shipping, and wrote and sent the letter to the plaintiff company because he so thought; and that the letter was written in order to control and regulate the shipping of the plaintiff company, which was shipping available for the needs of the country, in such manner as to make the best use thereof having regard to the circumstances of the time. The alleged circumstances of the time were that in February, 1917, for certain reasons, which were set out in the particulars, it had become necessary in order to secure the most effective use of available tonnage that all liner tonnage should be made equally available for any employment, and that there should be identity of interest and equality of reward between all lines, together with unity of control and wide common employment, with unrestricted freedom of disposition adapting supply to demand. Alternatively the letter was written on behalf of His Majesty the King and was necessary in exercise of His Majesty's Royal prerogative for the defence of His Majesty's Empire.

The parties had agreed that the case was to be determined as if reg. 39 BBB, which was made on June 28, 1917, had been in force on March 5, 1917.

Leslie Scott, K.C., *MacKinnon, K.C.*, and *G. D. Keogh*, for the plaintiffs. The duties of the Shipping Controller are defined by s. 6 of the New Ministries and Secretaries Act, 1916, to be the control and regulation of shipping, and for this purpose he is by the same section to have such powers of any Government department or authority as may be transferred to him by Order in Council, and such

(1) See note on p. 41, post.

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further powers as may be conferred on him by regulations to be made under the Defence of the Realm Consolidation Act, 1914. No Order in Council has been made under s. 36, and therefore, apart from the question of the Royal prerogative, the orders contained in the letter of March 5, 1917, can only be supported if they come within the powers conferred by reg. 39 BBB, and if that regulation is itself valid. The regulation is ultra vires and invalid. Sect. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914, gives power to make regulations "for securing the public safety and the defence of the realm." Reg. 39 BBB, in so far as it purports to regulate the manner in which shipowners shall carry on their business, as distinct from the use to which their ships shall be put, deals with matters which are not necessary for the safety or defence of the realm. Assuming reg. 39 BBB to be intra vires, it does not authorize such an order as is contained in the defendant's letter of March 5. The regulation authorizes the requisitioning of ships—that is to say, the taking of ships into the service of the Government. The letter does not purport to requisition the ships; it leaves them in the service of their owners; but it does requisition the services of the owners and their servants, and the profits which they may make in carrying on their business. In effect it is an attempt to tax shipowners without the consent of Parliament—a new form of ship-money. This action is maintainable, although a declaration is the only form of relief that is, or can be, claimed against the defendant: *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1)

Sir Frederick Smith, A.-G., Sir Gordon Hewart, S.-G., and *G. W. Ricketts*, for the defendant. The true meaning of s. 6 of the Act of 1916 is that the earlier part of the section gives the widest possible general powers to the Shipping Controller to carry out the explicit duties imposed upon him, the only qualification being that the best use is to be made of the shipping having regard to the circumstances of the time. The latter part of the section is dealing with special powers which, if given, are to be conferred by means of an Order in Council or a Defence of the Realm Regulation. The contention that the order of the Shipping Controller is a form of taxation involves the position that no regulation made in war time can be valid if it in any way interferes with the profits of a business. The contention

(1) [1915] 2 K. B. 536.

is untenable. Reg. 39 BBB is not ultra vires and the letter of March 5, taken as a whole, is a valid order within the regulation.

This action is not maintainable. The defendant is a servant of the Crown. He is not alleged to have personally committed a tort, and the validity of his acts as an officer of State cannot be challenged in an action against him, but only in a properly constituted suit against the Crown: *Dyson* v. *Attorney-General.* (1) Although Order XXV., r. 5, enables a declaratory judgment to be obtained where no other relief is or can be claimed, that does not enable an action for a declaratory judgment to be maintained against a person who could not otherwise be sued. *Raleigh* v. *Goschen* (2), *Bainbridge* v. *Postmaster-General* (3), and *Roper* v. *Public Works Commissioners* (4) show that, although the person who personally commits a tort can be made liable for it even if he is a servant of the Crown, such a declaration as that now claimed cannot be obtained against him. In *Graham* v. *Public Works Commissioners* (5), which was an action for damages for breach of contract, it was held that the defendants could be sued, but that was because, as was said by Phillimore J., the defendants were a corporation who, although agents of the Crown, had the power of contracting as principals. The inference from that judgment is that if the action had been brought against the head of a department of State which was not incorporated the action would not have lain. If the present plaintiffs are right the fact that the Public Works Commissioners are a corporation would have been immaterial. [They also referred to *Dixon* v. *Farrer.* (6)]

[BAILHACHE J. The observations of Romer J. in *Raleigh* v. *Goschen* (7), where he said that "the head of a Government department is not liable for the neglect or torts of officials in the department, unless it can be shewn that the act complained of was substantially the act of the head himself: in which case he would be liable as an individual, just as a stranger committing the same act would be," would seem to show that the action will lie.]

In the few cases where actions have been held maintainable

(1) [1911] 1 K. B. 410.
(2) [1898] 1 Ch. 73.
(3) [1906] 1 K. B. 178.
(4) [1915] 1 K. B. 45.
(5) [1901] 2 K. B. 781.
(6) (1886) 18 Q. B. D. 43.
(7) [1898] 1 Ch. 77.

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against the heads of a Government department the judges have based their decision on the fact that the particular department was, by statute or by the terms of its incorporation, given the right to sue and had the liability to be sued imposed upon it. The proper course in the present case was for the plaintiffs to sue the Attorney-General as representing the Crown.

Even assuming that the action will lie, the only declaration which the plaintiffs can claim is that the Shipping Controller is not entitled to requisition the plaintiffs' staff. The defendant does not claim any right to the plaintiffs' services. It is not proposed to contend that the acts done, or attempted to be done, by the Shipping Controller, if not justifiable under the regulations, are justifiable under the prerogative.

Leslie Scott, K.C., in reply. The defendant is sued, and has entered an appearance, in his personal capacity. No petition of right lies, as there is no contract with the Crown. Where an individual defendant does an act which he has to justify under some statutory power or under the prerogative he can be sued personally, and to escape liability he must show that the statute or the prerogative extends to what he has done. If the act is not justifiable he is personally liable : *Feather* v. *Reg.* (1) ; and it follows that an action for a declaration will li : see Order xxv., r. 5. If the requisitioning letter was valid, ea f the directors of the plaintiff company would, if he had refused compliance with its terms, have been liable to prosecution ; and they are entitled to use this declaratory form of action as a shield against prosecution. The case comes within the language of Romer J. in *Raleigh* v. *Goschen* (2), where he said : " On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government, or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs would, of necessity, be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, ... then the latter could be sued." There is no rule of law which prescribes that such an action must be brought against the Attorney-General.

(1) (1865) 6 B. & S. 257, 295, 296. (2) [1898] 1 Ch. 79.

This was not a lawful requisition under the prerogative, or under the regulations. The essence of a lawful requisition is that during its subsistence the vessel shall cease to be at the disposal of the shipowners. In reality, under cover of a requisition, the Shipping Controller's act was an attempt to tax the subject. Even assuming that the regulation is intra vires, the paragraph relied upon by the Shipping Controller does not authorize him to take over a vessel for any other object than of running her by himself or his nominees; and the letter, which must be read as a whole, shows that it was not the Shipping Controller's intention to take over the vessel.

Cur. adv. vult.

1917. Nov. 15. BAILHACHE J. read the following judgment:— This is an action against the Shipping Controller in which the China Mutual Steam Navigation Company, Limited, claim a declaration that a certain voyage of the steamship *Keemun*, which left Liverpool for Eastern ports on April 8 last, was for the owners' account. Behind this innocent-looking claim lies hid the grave question whether an order issued by the Shipping Controller on March 5 last was within his powers or not. The office of Shipping Controller was created by s. 5 of the New Ministries and Secretaries Act, 1916. His duties were defined by s. 6 of that Act, and by the same section he was to have for the purpose of enabling him to perform those duties the powers of any Government department or authority, which His Majesty by Order in Council might transfer to him, and also such further powers as might be conferred upon him by regulations under the Defence of the Realm Consolidation Act, 1914; and regulations might be made under that Act accordingly. No Order in Council has transferred any powers to the Shipping Controller, but a regulation, No. 39 BBB, made under the Defence of the Realm Consolidation Act, 1914, has conferred very wide powers upon him, among others the power of requisitioning ships.

It was contended for the plaintiffs that so far as the regulation purported to confer that power it was ultra vires. I think that contention unsound. The Defence of the Realm Consolidation Act, 1914, empowered His Majesty in Council during the present war to issue regulations for securing the public safety and the defence of the realm, and I do not doubt that reg. 39 BBB was rightly issued. The

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regulation was not issued until June 28 last, but the plaintiffs agreed that this case was to be determined as if that regulation had been in force on March 5. The order of the Shipping Controller of that date formulated a scheme for working the plaintiffs' fleet. This scheme had three essential features: (*a*) the steamers were requisitioned; (*b*) the owners were to work them exactly as if they were still running for their own account; (*c*) they were to run them in fact for the Government, accounting to the Government for all profits after deducting working expenses, hire of the steamship, and remuneration for their services. These two last items to be settled by agreement, or, failing agreement, by arbitration. The scheme purported to be mandatory in all these respects. It is obviously a scheme which can only be worked as a whole. It is indivisible, and as a whole it must be judged. The scheme requisitioned three things—the ships, the owners' services, the profits; and the question to be determined is whether such a scheme, intended to be obligatory throughout, is within the powers conferred upon the Shipping Controller. The answer is to be sought in reg. 39 BBB, where alone his powers are to be found. A close examination of that regulation has convinced me that it contains no powers to requisition the services of the owners. Indeed, the Attorney-General towards the close of his argument admitted that such was the case. The scheme, therefore, is ultra vires in its second essential respect, and the order of March 5 cannot be supported.

It was urged for the plaintiffs that, taking the scheme as a whole, it is not a requisition of ships but of owners' trading profits, and that it is in effect a taxation of the plaintiffs without parliamentary authority, a revival of ship-money in a new form. In the view I have taken of the right to requisition the owners' services this point does not appear to call for separate decision, since there could be no owners' trading profits unless the ships were managed by the owners. Trading profits could no doubt be made if the ships were taken out of the owners' hands on time charters, or by some other form of requisition open to the Shipping Controller, and such profits might be made by the Controller as by any private time charterers, but the retention by the Government of profits so made could not be called taxation of the owners within any meaning of the word "taxation" known to me.

A preliminary point was taken by the Attorney-General that this action will not lie against the Shipping Controller, but that it should have been brought against the Attorney-General as representing the Crown. I do not think so. I adopt the observations upon this head of Romer J. in *Raleigh* v. *Goschen* (1) and the statement of the law by the then Attorney-General, Sir Richard Webster, in these terms (2): "If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be inquired into in this Court; and in such a case it does not matter whether the defendant is the head of a department or not." That statement of the law plainly contemplates that the officer of State whose conduct is in question would be the defendant to the action. I make the declaration asked for.

I have now discharged my duties as judge, but perhaps, in view of the public importance of this case, I may venture on two further observations: one is that if such a scheme as the Shipping Controller desires is to be carried out the services of the owners must be obtained by negotiation and not by command; the other is that I am so impressed with the advantage of the management of lines of steamers remaining where possible with the owners that I sincerely trust that in the grave times through which we are passing owners will fall in of their own free will and on reasonable terms with such arrangements as the Shipping Controller may think necessary. I should deeply regret it if any judgment of mine made his task more difficult or in any way hindered the wise and energetic use of our sadly depleted tonnage.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Stokes & Stokes, for Cameron, MacIver & Davie, Liverpool.*

Solicitor for defendant: *Treasury Solicitor.*

(1) [1898] 1 Ch. 77. (2) [1898] 1 Ch. 78.

NOTE.—By an Order in Council dated June 28, 1917 (Statutory Rules and Orders, 1917, No. 656), the Defence of the Realm Regulations were amended by, inter alia, inserting after reg. 39 BB the following Regulation:—

"39 BBB . . . . (3.) The Shipping Controller may by order requisi-

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tion or require to be placed at his disposal, in order that they may be used in the manner best suited for the needs of the country, any ships, or any cargo space or passenger accommodation in any ships, or any rights under any charter, freight engagement, or similar contract affecting any ship, and require ships so requisitioned to be delivered to the Controller or any person or persons named by him at such times and at such places as the Controller may require, where it appears to the Controller necessary or expedient to make any such order for the purpose of making shipping available for the needs of the country in such manner as to make the best use thereof having regard to the circumstances of the time. Such compensation shall be paid in respect of the use of a ship or cargo space or passenger accommodation requisitioned under this regulation and for services rendered during the use thereof, and for loss or damage thereby occasioned as in default of agreement may be determined by the Board of Arbitration constituted under the Proclamation of the third day of August, 1914, respecting the requisitioning of ships by the Admiralty. . . . . (5.) Any order under this regulation may be made so as to apply generally to all ships or to apply to ships belonging to any particular owner, or to ships of any class or description, or so as to apply to any specified ship, and any such order may direct that all contracts or any class of contracts or any special contract affected by the order shall be abrogated, or shall remain in force notwithstanding anything in the order, but subject to any exceptions or modifications for which provision may be made by the order. (6.) If the owner, master, or other person in charge of a ship or any other person affected by an order under this regulation acts in contravention of or fails to comply with any provisions of the order, or aids or abets any other person, whether or not such other person is in the United Kingdom, in doing anything which if done in the United Kingdom would be a contravention of any such provision, he shall be guilty of a summary offence against these regulations, and if such person is a company, every director and officer of the company shall also be guilty of an offence against these regulations unless he proves that the contravention took place without his knowledge or consent. (7.) The powers conferred by this regulation shall be in addition to and not in derogation of any prerogative right or other powers of His Majesty, and where before the twenty-eighth day of June, 1917, any ship or any cargo space or passenger accommodation in any ship or any rights under any charter, freight engagement, or similar contract affecting any ship has been requisitioned by the Shipping Controller this regulation shall, after that date, apply as if the same had been requisitioned in pursuance of this regulation."

F. O. R.

GUARANTY TRUST COMPANY OF NEW YORK *v.* HANNAY & CO.

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April 11, 12, 13.

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June 29; *July* 2, 30.

Bill of Exchange—"Requisites in form"—Unconditionality—"Enforcing payment" of Bill—Whether where Bill alleged to have been paid by Mistake a Declaration that Payee entitled to retain the Money is equivalent to enforcing Payment—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 3; *s.* 72, *sub-s.* 1, *proviso* (*b*).

By s. 72, sub-s. 1, of the Bills of Exchange Act, 1882, "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows—(1.) The validity of a bill as regard requisites in form is determined by the law of the place of issue."

By s. 3, sub-s. 1, which is headed "Form and Interpretation," "A bill of exchange is an unconditional order in writing."

By s. 72, sub-s. 1, proviso (*b*), "Where a bill issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who . . . . become parties to it in the United Kingdom."

The defendants, who carried on business in Liverpool, purchased cotton from dealers in the United States, who drew a bill of exchange on them for the price in the following form: "Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves 1464*l.* 9*s.* value received, and charge same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," and issued that bill in the United States. The plaintiffs, who were dealers in foreign bills of exchange in New York, in good faith purchased the bill of exchange with the bill of lading of the cotton attached, and sent the documents to the defendants in Liverpool, who accepted the bill and paid it at maturity. The bill of lading was a forgery and no cotton had been shipped under it. The defendants, on discovery of the fraud, claimed that the bill of exchange was conditional on the genuineness of the bill of lading, and brought an action in America against the plaintiffs to recover back the amount of the bill so paid by them. The American Court held that the case must be decided according to the law of England. The plaintiffs then brought this action in England claiming declarations that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant or represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill. According to the American law as it appeared to this Court the bill of exchange in question was not a negotiable instrument, but was conditional on the genuineness of the bill of lading:—

Held: (1.) That, having regard to the language of s. 3, sub-s. 1, of the Bills of Exchange Act, 1882, the question whether the bill

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He went into the market and found a buyer, in this case the plaintiffs, whose business is the buying of foreign exchange. This, as I understand, means the purchase at their present value of drafts payable at a future date in a foreign country. The contract made by Van Gerpen with the plaintiffs is evidenced by a memorandum sent to him by the plaintiffs in these terms: "Bill of Knight, Yancey & Co., Decatur, Alabama, on Bank of Liverpool, Ltd., Liverpool, against 100 bales of cotton payable in London at sixty days' sight. Documents against acceptance. Rate 4.8778. To be mailed promptly by F. Van Gerpen, brokers." In order to obtain immediate payment for the cotton and to enable Mr. Van Gerpen to effect the sale of the draft on the Liverpool bank and make delivery of the documents in New York Messrs. Knight, Yancey & Co. drew upon Mr. Van Gerpen on February 10, 1910, a draft payable to the cashier of the bank at Decatur. This draft upon Van Gerpen was discounted by the Decatur bank, and Knight, Yancey & Co. were credited with the proceeds. The Decatur bank sent the draft on Van Gerpen, together with the draft on the Liverpool bank with the shipping documents attached, to their New York agents, the Hanover National Bank. Mr. Van Gerpen paid this bank the amount of the draft upon him and got the documents from the bank on February 14, 1910, handed them to the plaintiffs, received a cheque for the price of the draft, and advised Messrs. Knight, Yancey & Co. of what he had done, and this part of the transaction was complete. These details are unnecessary except to emphasize the fact that Van Gerpen and the plaintiffs are dealers in exchange and not in cotton. Mr. Max May, one of the vice-presidents of the plaintiff company, says at p. 226 of the American record: "Our company does not buy and sell cotton. It deals exclusively in bills of exchange. When we buy a bill of exchange with documents attached, whether warehouse receipts or bills of lading, the documents serve as temporary security until the bill of exchange is accepted by the bank drawn upon." The plaintiffs having bought this bill of exchange sent it with the bill of lading to Liverpool for acceptance under cover of a letter to the Bank of Liverpool dated February 15, 1910, which, so far as is material, runs: "We beg to enclose for favour of your procuring acceptance and transmitting for our account to the Guaranty Trust Company of New York,

33, Lombard Street, London, the bills noted at foot. In case of refusal to accept we will be obliged by your having the bills noted and communicating with our London office respecting them." Then follows a list of bills, including the one in question. The Bank of Liverpool had an arrangement with the defendants under which they accepted, as agents for the defendants and on their behalf, drafts such as the present upon business terms, and on receipt of the documents from America the Bank of Liverpool sent their usual communications to the defendants requesting them to call and inspect the documents at once so that the draft, if in order, might be accepted without delay. The defendants called, inspected the documents, found them to be apparently in order, and instructed the bank to accept the draft by letter of February 23, 1910. Up to this time the bill of lading had been physically attached to the draft. Upon acceptance the Bank of Liverpool detached and kept the bill of lading, and under cover of a letter of February 24, 1910, sent the draft now duly accepted to the plaintiffs' London house as instructed. The acceptance was sold by the plaintiffs, passed through one or two hands, and ultimately on April 27, 1910, the Bank of Liverpool honoured their acceptance by payment to the London City and Midland Bank, the then holders. Some suspicions had been aroused as to the genuineness of the bill of lading before the acceptance was met, but the Bank of Liverpool felt themselves unable on that account to refuse payment. Having paid, they debited the defendants with the amount, with the result that on this particular transaction the defendants have lost 1464*l.* I regret to say that this is only one transaction, that there were many of the same class, and the total losses have been very large.

Upon this state of facts the defendants, Messrs. Hannay, brought an action in New York against the plaintiffs, the Guaranty Trust Company, claiming payment of the aforesaid sum of 1464*l.* upon three grounds—(*a*) warranty by the Guaranty Trust Company that the bill of lading was genuine and that the cotton therein described had been shipped; (*b*) a representation by them to the same effect; (*c*) mistake of fact, namely, genuineness of the bill of lading and shipment of the cotton under it. To the complaint the Guaranty Trust Company demurred. The demurrer was heard by Noyes J. and was overruled. In the course of his judgment that learned

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judge says it was conceded that if the draft was a plain draft, that is, contained no reference to the cotton, the then plaintiffs, Messrs. Hannay, could not recover; but he held upon the authority of two American cases, namely, *National Bank* v. *Merchants' Bank* (1) and *Guaranty Trust Co. of New York* v. *Grotrian* (2), that the reference to the cotton "charge the same to the account of R.S.M.I. 100 bales of cotton" made the draft conditional, and, further, that although the acceptance was general, yet the general acceptance of a conditional draft binds the acceptor to pay according to the conditions and not otherwise. It was for this reason he overruled the demurrer, and it was conceded before me that if this acceptance is conditional, that is, is not a negotiable instrument, the defendants are entitled to have their money back. The learned judge gave the Guaranty Trust Company leave to file a further answer to the complaint. Messrs. Hannay amended this complaint in small immaterial matters, and the Guaranty Trust Company filed their answer, which consisted of a traverse of Messrs. Hannay's points and a denial that the acceptance was conditional. The case then came on for hearing; a great deal of evidence was called, including expert evidence as to the English law on the subject, but the learned judge held that he ought not to differ from Noyes J.'s opinion that the acceptance was conditional, and directed a verdict to be returned for Messrs. Hannay. On appeal this judgment was reversed by the United States Circuit Court of Appeal, and a new trial ordered upon the ground that the case was governed by English law, and that the trial judge had disregarded the evidence before him of what the English law was. This decision was binding upon the parties in America and is binding upon them here. The Guaranty Trust Company thereupon decided to attempt to get the decision of the English Courts upon the English law applicable, and on October 9, 1914, issued their writ, and by their points of claim dated March 31, 1915, claimed certain declarations: "A declaration that on the true construction of the document set out in paragraph 3 hereof the document was an unconditional draft, and was a bill of exchange within the meaning of the Bills of Exchange Act, 1882. A declaration that upon its true construction the acceptance set out in para-

(1) (1875) 91 U. S. 92. (2) (1902) 114 Fed. Rep. 433.

graph 9 hereof is an unconditional acceptance. A declaration that the plaintiffs by presenting the said draft for acceptance with the bill of lading and insurance certificate attached, as set out in paragraph 8 hereof, did not warrant the genuineness of the said bill of lading by the law of England. A declaration that the facts set out in paragraphs 1 to 4 hereof do not disclose any liability by the plaintiffs to the defendants by the law of England." The defendants at first took some objection to the power of the Court to make the declarations asked, but they have since counterclaimed in respect of the acceptance in question, and it is immaterial whether the law is declared as the plaintiffs ask or whether the matter is decided upon the defendants' counter-claim. In either case the English law applicable to the case will be decided and the rights of the parties ascertained. The defendants' counter-claim is for a declaration that the plaintiffs are liable to pay to the defendants the sum of 1464*l.* with interest, or to indemnify the defendants against the loss sustained by them in consequence of the payment of the draft in question by the Bank of Liverpool. When the action came on for trial the grounds upon which the counter-claim was based were that the plaintiffs, in sending the draft and bill of lading to the Bank of Liverpool and requesting them to accept the draft, (*a*) warranted the genuineness of the bill of lading; (*b*) represented the bill of lading was genuine; (*c*) undertook to indemnify the defendants against loss if the bill of lading was not genuine; (*d*) failure of consideration, whereby the moneys paid by the Bank of Liverpool to the holders in due course became moneys had and received by the plaintiffs for the use of the defendants or moneys paid by the defendants to the use of the plaintiffs at their request; (*e*) that the contract constituted by the acceptance was entered into under a mistake of fact common to both parties. During the hearing the defendants desired to amend their defence and by leave did so. This amendment reads thus: "The defendants will further contend that under the law of England the validity and the form of the said draft and the interpretation thereof and the rights acquired by the plaintiffs by the transfer and indorsement to them thereof depend on American law, and that by the said law the said draft was a conditional draft and was not a bill of exchange or a negotiable instrument. The American law has been so decided between the

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plaintiffs and the defendants by a judgment of Noyes J. in the suit between the parties referred to in the points of claim, which judgment operates as an estoppel between the parties." The amendment created a curious and unfortunate situation. When the Court of Appeal in America held that the case was governed by English law the present plaintiffs took the sensible step of coming to the Courts here to get their decision, and so avoid the necessity of taking the evidence of expert witnesses upon English law, from whose differing opinions a puzzled American Court would have to ascertain as best it could what the English law was. The amendment has led to the very result which this action was intended to avoid; but, unfortunately, instead of the American Courts having to wrestle with the problem of what the English law is, the English Courts have to find first if American law applies, and if it does, then from very conflicting testimony what the American law is.

I propose to reserve the American law point to the last and to deal first with the case as it stood before this amendment was made. In so dealing with the case I treat the bill of lading as a negotiable instrument, for such undoubtedly it is if English law governs the matter and does not throw the parties back upon American law. There are no facts in dispute. The draft being in English law negotiable, its form is immaterial, and the point to be decided is: Does the person who buys from the seller of goods an unaccepted draft upon the buyer with the bill of lading attached, and who forwards the documents with a request that the draft be accepted to the person who has bought the goods covered by the bill of lading, and is under a contractual obligation to his seller to accept the draft against presentation of the bill of lading, incur any liability to the buyer who accepts the draft and pays it on maturity if it turns out that the bill of lading is a forgery? It is probable that the defendants have in their counter-claim exhaustively enumerated all the grounds upon which this question can be answered in the affirmative. Of those grounds the first three—namely, warranty, representation, and undertaking to indemnify—are all alleged to arise by implication out of the circumstances of the case. So far as I am concerned the case is admittedly covered against the defendants by the decision of Malins V.-C. in *Leather* v. *Simpson*. (1) That case was decided

(1) (1871) L. R. 11 Eq. 398.

in 1871. It has never, I think, been questioned. It is quoted as an authority in the text-books, and I must of course follow it. In view of the fact that that decision is open to review by a higher tribunal and of the large sums involved in this action, and in deference to Mr. Langdon's brilliant argument for the defendants, I propose to consider this case on principle and apart from the authority of *Leather* v. *Simpson*. (1) The best way to approach the subject is I think to take the defendants' points as raised by their counter-claim seriatim. Taking the points, then, in order, the first is warranty. The defendants say that in consideration of the acceptance of the draft by the Bank of Liverpool the plaintiffs warranted the genuineness of the bill of lading. It is not suggested that they expressly did so, but it is said that a warranty arises out of the circumstances. The answer seems to me to depend upon what was the object and effect of Knight, Yancey & Co. handing the bill of lading to the plaintiffs and of their handing it in turn to the Bank of Liverpool. The bill of lading was indorsed by Knight, Yancey & Co., and the goods were deliverable to the holder. If the true transaction was that by the indorsement and delivery of the bill of lading to the plaintiffs the property in the goods passed to them and was by them transferred to the defendants, there would, I think, be a warranty of genuineness by the plaintiffs. Now a transfer of a bill of lading has such efficacy as is necessary for the carrying out of the transaction to which the indorsement and delivery of the bill of lading are incident. It may or may not pass the property in the goods. There were two reasons in this case why the bill of lading duly indorsed should be delivered to the plaintiffs. The first was to enable the plaintiffs to send it with the draft to the defendants, whose obligation was to accept against the bill of lading. The second reason was to give the plaintiffs the security of the goods in the event of the defendants' refusal to accept the draft. The plaintiffs did not buy the cotton; they bought the exchange. No doubt the plaintiffs in buying the exchange relied upon the fact that if acceptance was refused the bill of lading would be returned to them and its possession would cover them from loss, and they obviously would not have bought the exchange without the bill of lading. They relied upon it just as in a lesser degree they relied upon

(1) L. R. 11 Eq. 398.

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the credit and good faith of Knight, Yancey & Co., and it was for these reasons that the plaintiffs sent the bill of lading to the defendants, and not because they were selling cotton to them. The defendants were not buying cotton or anything else from the plaintiffs. They had already bought the cotton represented by the bill of lading from Knight, Yancey & Co. It is obvious that they were making no new or further purchase of the same cotton from the plaintiffs. No complaint of inferiority in quality or loss of weight would have been addressed to the plaintiffs, and no allowance in respect of such inferiority would or could have been claimed from any one but Knight, Yancey & Co. It appears, indeed, from Mr. Anthony Hannay's evidence that the defendants had had a few earlier dealings with Knight, Yancey & Co., in which the transactions had been carried through in precisely the same way as the one in question; that there had been small claims for loss of weight, and that these claims had been addressed to and paid by Knight, Yancey & Co. or their guarantors the Cotton Commission Company (see the correspondence printed in the record, and in particular a letter from the defendants to the Cotton Commission Company dated February 8, 1910). The plaintiffs had at most a temporary title to the goods, a title not transferable to the defendants, but defeasible upon the acceptance of the drafts. The plaintiffs were not the sellers of the goods or of the bill of lading; no property was intended to pass from them to the defendants. Upon acceptance of the draft the property in the goods passed from Knight, Yancey & Co. to the defendants under their contract. Nor do there appear to be any other circumstances from which a warranty can be implied, unless it be the request to accept the draft, which I will deal with in a moment or two. The question of warranty arising from the circumstances is one for the Court and not for a jury, but at the defendants' desire I put the question to a jury, and they answered it in the negative and were then discharged. The next point is representation. Again, it is not suggested that there was any express representation as to the genuineness of the bill of exchange, but it is said that such a representation must be implied from the fact that the plaintiffs tendered the bill of lading to the defendants with the draft. Now it is to be observed that the plaintiffs had no better means of knowing whether the bill of lading was

a forgery than the defendants. They were not primarily concerned with the bill of lading, but with the draft. It was not their duty, but that of the defendants, to satisfy themselves as to the genuineness of the bill of lading, and it was the defendants who examined the bill of lading before authorizing the Bank of Liverpool to accept. No doubt the defendants did not expect, and did not examine for, forgery, but that is not because of any representation, express or implied, made to them by the plaintiffs, but because they never suspected Knight, Yancey & Co. The bill of lading gained nothing in credence or sanction in passing through the plaintiffs' hands. There are, in my opinion, no circumstances out of which a representation can be implied. The point is moreover covered against the defendants by the case of *Baxter* v. *Chapman*. (1) The next point is failure of consideration. It is said, truly enough, that by reason of the bill of lading being a forgery there was a total want of consideration for the acceptance. It must, however, be remembered that the plaintiffs are the indorsees and the defendants are, through the Bank of Liverpool, the acceptors of a bill of exchange. That is the only contractual nexus between them. No consideration was ever intended to pass from the plaintiffs to the defendants—it was intended to pass from the drawers; and the total failure of consideration as between the drawer and acceptor of a bill of exchange is no answer to an action by a bona fide holder without notice as the plaintiffs were, and it makes no difference whether the indorsement preceded or succeeded the acceptance. I would refer on this point to the lucid and conclusive judgment in *Robinson* v. *Reynolds*. (2) The next point is indemnity. Here again the indemnity (if any) arises by implication. It is put upon the ground that the Bank of Liverpool accepted the draft and incurred liability upon it at the plaintiffs' request and the plaintiffs thereby impliedly undertook to indemnify the defendants against loss. What in fact the plaintiffs asked the defendants to do was to perform their contract with Knight, Yancey & Co., and, as I understand the law, if A. request B. to perform his contract with C., and B. does so, A. incurs no liability to B., although B. by performing his contract suffers loss. In such a case B. must seek his remedy (if any) against his co-contractor: see the opening sentences of the judgment of Farwell L.J.

(1) (1873) 29 L. T. 642. (2) (1841) 2 Q. B. 196.

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in *Moel Tryvan Ship Co.* v. *Kruger & Co.* (1) The defendants' last point is mutual mistake of fact. Now there is no doubt that the plaintiffs when they bought the bill of exchange believed the bill of lading to be genuine, and there is no doubt that the defendants when they accepted the bill of exchange did so in the same belief. Both parties were innocent and the defendants have suffered loss. Assuming the doctrine of mutual mistake of fact to apply, I ask myself what possible reason can there be for shifting the loss from the shoulders of the innocent party on whom it has fallen to the shoulders of the equally innocent party who has escaped the loss. I can find none. Moreover, as I have already pointed out, the duty of ascertaining the genuineness of the bill of lading was primarily that of the defendants. I have now dealt with all the points raised by the defendants upon the assumption that the matter is entirely governed by English law. If it is, then upon authority which binds me, and, as I have tried to show, on principle apart from authority, the defendants' counter-claim fails and the plaintiffs are right.

It remains to consider whether English law throws the parties back upon American law, and, if so, what the American law is. The defendants say that the draft sold to the plaintiffs and accepted by the defendants is not regarded in America as a negotiable instrument, but as a conditional order or assignment of a fund. To ascertain whether American law applies one must consider the Bills of Exchange Act, 1882. Sect. 72 of that Act lays down the rules to be followed where laws conflict, and provides that " Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows : " Sub-s. 1 : " The validity of a bill as regards requisites in form is determined by the law of the place of issue," and on turning to s. 3, sub-s. 1, which deals with " Form and Interpretation," one finds that " a bill of exchange is an unconditional order in writing." By s. 2 of the Act " ' Issue ' means the first delivery of a bill or note, complete in form to a person who takes it as a holder." Undoubtedly this document was delivered either in Alabama or New York. It is unnecessary to decide which of the two, as the law of both States is admittedly the same. Both States have adopted the Bills of Exchange Act so far as is material to any purpose in

(1) [1907] 1 K. B. 809, 825.

this action—the State of New York in 1897, and the State of Alabama in 1907. The plaintiffs, however, draw attention to the proviso to sub-s. 1 of s. 72, which runs thus: "(*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom." The defendants rely upon this proviso as showing that this draft must be construed by English law. I do not agree that the proviso has any such effect for any purpose relevant to this action. The proviso would have been material and conclusive had the Liverpool bank refused to honour their acceptance and an action had been brought against them by the London City and Midland Bank. But there is no question of enforcing payment in this country. The acceptance was duly met. The question here is, Was this draft a conditional order when the plaintiffs bought it and when they presented it for acceptance to the defendants, and they accepted it? This question is untouched by the proviso. I think the defendants are right when they say that in order to ascertain whether the document was as between them and the plaintiffs a negotiable instrument one must have regard to the American law, America being the place of issue.

It is common ground that unless the draft in question was a negotiable instrument the defendants have all the defences against the plaintiffs which they have against Knight, Yancey & Co. If the American law applies, and if by American law the draft is a conditional order merely, it is conceded that the defendants are entitled to recover. American law is of course in this country a question of fact. Three eminent and highly competent counsel have testified on each side—on the plaintiffs' side that the draft is unconditional, on the defendants' side that it is conditional. They have supported their several views by a wealth of authority, and my task is to decide as best I can between these divergent views, and in so doing to consider the authorities cited on the one side and the other. The authorities were put in evidence for this purpose.

The draft in question is undoubtedly unconditonal by English law, and as both New York and Alabama have adopted an Act substantially identical with our Bills of Exchange Act one would

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expect that the same rule of construction of the draft would be applied in America, especially as the witnesses for the plaintiffs say, and support their testimony by authority, that an American State adopting a foreign statute takes over the case law interpreting the statute down to its adoption, and must be taken to use the words of the statute in the sense of the foreign case law. Prima facie, therefore, and apart from evidence to the contrary, it might be presumed that when these American States adopted, as they have done, sub-s. 3 of s. 3 of our Act, which provides that "an unqualified order to pay coupled with (*a*) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional," American law would follow the English law and hold that this draft is unconditional. The burden of proving that American law has not done so lies upon the defendants. They attempt to discharge that burden by their witnesses and by the following cases:—*Lowery* v. *Steward* (1), decided in 1862. The document there ran: "Please pay to the order of Archibald H. Lowery $500 on account of twenty-four bales cotton shipped to you as per bill of lading by steamer *Colorado* inclosed to you in letter." This was held to be a conditional order. The Court, in arriving at this decision, took into consideration a contemporaneous letter to the drawees and all the surrounding circumstances in order to arrive at the real intention of the drawers. I am using, and shall use for brevity's sake, terms applicable to bills of exchange properly so called. The next case relied upon by the defendants is *Brill* v. *Tuttle*. (2) This case was decided in 1880 on appeal. The document in that case ran: "Pay Brill and Russell $300 and charge same to our account for labour and materials performed and furnished in the repairs and alterations of the house in which you reside in the village of Mohawk." This was held not to be a negotiable instrument but an assignment (pro tanto) of a fund. The Court dealt with the case of *Lowery* v. *Steward* (1), and pointed out that the Court, in construing the instrument in that case, had regard to the correspondence. The Court laid down the law thus: "The question in all this class of cases is the same, and it must be determined according to the circum-

(1) (1862) 25 N. Y. 239. (2) (1880) 81 N. Y. 454, 462.

stances in each case. It is whether the draft is drawn upon the general credit of the drawee, or upon a particular fund." The defendants' next case is *Hibbs* v. *Brown.* (1) This case came before the Court of Appeal in New York in 1907. The case itself was concerned with the negotiability of certain coupons, and the facts are not important for my purpose. The leading judgment was delivered by Hiscock J. He cites *Lowery* v. *Steward* (2) and *Brill* v. *Tuttle* (3) and other cases, and says of them: "It seems as if no extended comment upon these cases were necessary to point out . . . . how clearly each instrument mentioned in them is an order upon, an assignment pro tanto of, a limited fund without any general credit or liability behind it." In citing *Lowery* v. *Steward* (2) he gives the form of the instrument itself and does not refer to the correspondence in that case. In the same case Werner J. says: "The cases referred to, as well as the statute," (that is, the Negotiable Instruments Law of New York) "make it entirely clear that the mere indication of a particular fund from which the maker of an instrument may reimburse himself, or a mere reference to a specified account which is to be debited with the amount called for by the instrument, does not affect its unconditionality, and it is only where the order or promise is to pay out of a particular fund that it is considered conditional in such sense as to destroy the negotiability of the instrument." This case is not important for its facts, but because the discussion is ten years later than the New York Negotiable Instruments Law and both *Lowery* v. *Steward* (2) and *Brill* v. *Tuttle* (3) are treated as valid subsisting authorities. The plaintiffs, on the other hand, rely upon the following cases: *Waddell* v. *Hanover National Bank of City of New York.* (4) This case came before Leventritt J. in the Court of First Instance in New York and was decided in 1905. The instrument ran: "On demand pay to the order of Jeffersons' Bank $1500 C/A.R.L. No. 3362 via A.R.L.B.L. direct value received and charge same to the account of Mound City Swanu Co." The action was by the acceptors against the holders to recover their money upon the ground that no produce had reached them. The drawers had written to the plaintiffs: "Enclosed

(1) (1907) 190 N. Y. 167, 183.
(2) 25 N. Y. 239.
(3) 81 N. Y. 454, 462.
(4) (1905) 48 N. Y. Miscel. Rep. 578.

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please find invoice of 400 cases of eggs shipped you in car No. 3362 A.R.L. stencilled F. We passed draft on you to-day for $1500 which kindly protect upon presentation." The draft was held to be negotiable. The learned judge comments on *Lowery* v. *Steward* (1), and says that the case was correctly decided but depends upon the facts and letters. It is to be observed that the surrounding circumstances were as closely considered by the learned judge in this case as they were in *Lowery* v. *Steward*. (1) The plaintiffs' next case is *Amsinck* v. *Rogers* (2), decided by the New York Court of Appeal in 1907, the same year and shortly before *Hibbs* v. *Brown*. (3) The instrument in this case ran: "On demand of this original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Co. 2258*l*. 6*s*. 8*d*. payable at rate for bankers cheques on London value received and charge the same to account of pig iron per s.s. *Quarnero*." The immediate question in this case arose upon a conflict of laws, and was whether for the purposes of protest the law of the place where the bill of exchange was drawn or where it was payable ruled the point. The judgment was in this case, as in *Hibbs* v. *Brown* (3), delivered by Hiscock J. The question whether the particular instrument was a bill of exchange was not argued, but the judge said (4): "There is no doubt, and in fact it is not denied by the learned counsel for the appellants, that it was a bill of exchange under the laws of the State of New York." The defendants also cited two Alabama cases, one *Bank of Guntersville* v. *Jones Cotton Co.* (5), decided in 1908, the year after the adoption by the State of Alabama of our Bills of Exchange Act, but upon a transaction which took place in 1906. The draft ran: "At sight pay to the order of A. L. Gibson $56.8 value received and charge to account of one bale of cotton. Bill of lading attached." The Court held that the instrument sued on was governed by the commercial law. The point does not appear to have been discussed. The other Alabama case is *Cosmos Cotton Co.* v. *National Bank of Birmingham* (6), decided in 1911. The draft ran: "At sight pay to the order of W. W. Crawford $6401.30. Bill of lading attached for 100 bales of cotton marked W.H.O." The only point dealt with

(1) 25 N. Y. 239.
(2) (1907) 189 N. Y. 252.
(3) 190 N. Y. 167, 183.
(4) 189 N. Y. 265.
(5) (1908) 156 Alabama, 125.
(6) (1911) 171 Alabama, 392.

in the report is the liability of the bank, which bought the draft with the bill of lading attached, for short weight. I do not gather that the question of negotiability was discussed, and the decision would have been the same whether the instrument was negotiable or not. Pausing there for a moment, it is clear from the evidence of all the witnesses, and from a large number of cases to which space forbids me to refer in detail, that in American law the attachment of a bill of lading to a plain draft, that is to say, to a draft which contains no reference to the bill of lading, or to the transactions of which it forms part, or to a reimbursement fund, does not make the draft conditional. It seems probable that the result is the same when the draft merely states that the bill of lading is attached. It is further clear, as the defendants' witnesses have stated, and as the cases to which I have referred show, that where the draft is not a plain draft or does not merely refer to the bill of lading, but refers on its surface to the contract which calls for it or the fund to which the acceptor is to look for reimbursement, the American Courts consider all the surrounding circumstances, and do not simply consider the words to be found within the four corners of the instrument itself. When one does that it is obvious that on slightly different words, or even on the same words in the draft, different conclusions may be arrived at. Take for instance *Waddell's Case*. (1) The draft was payable on demand and the produce (eggs) to which the drawee was to look for reimbursement would not in all likelihood reach the drawee before the draft was presented for payment. In such a case it is obvious that the drawee would be expected to pay out of his own moneys and trust to the arrival and sale of the eggs to recoup himself. Had the draft in that case been as here a sixty days' sight draft the conclusion might have been quite different although in other respects the draft had been in the same words.

If the matter rested upon the evidence before me and the cases cited to me the balance of my opinion would have been in the plaintiffs' favour notwithstanding these last observations. I should at any rate have held that the defendants had failed to satisfy me that the American law was different from ours since the

(1) 48 N. Y. Miscel. Rep. 578.

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adoption by both Alabama and New York of our own Bills of Exchange Act. I am free to confess that in some respects the evidence of the plaintiffs' witnesses appeals more strongly to me than does that of the defendants' witnesses. I refer more particularly to those portions of their evidence in which they give their views upon the effect of the adoption of our Bills of Exchange Act upon the earlier American decisions. The matter, however, does not stop there. The point came before Noyes J. on demurrer, as I have already stated. His decision is admittedly no estoppel, but it is a decision of an American judge upon the very instrument now in debate, and that judge has decided that, according to American law, the present instrument is a conditional one only and not negotiable. He bases his judgment on two cases. The first is *National Bank* v. *Merchants' Bank* (1), decided in 1875. That case decides that when a draft is to be accepted against a bill of lading the acceptor is entitled to have the bill of lading delivered to him on accepting the draft—a proposition no one in this country would now dispute; but its bearing upon the point in issue is, I confess, not clear to me. The other case is *Guaranty Trust Co. of New York* (the present plaintiffs) v. *Grotrian* (2), decided in 1902. The question there was whether an acceptance was conditional or not. The instrument ran thus: "Sixty days after sight of this first (second unpaid) pay to my order in London 1518*l.* 8*s.* 7*d.* sterling value received and charge the same to account of 8417.50 bushels flax seed." The acceptance was in these words: "Accepted payable at Lloyds Bank Limited London against indorsed bills of lading for 8417 bushels flax seed per *Buffalo* s.s. at New York and certificate of insurance $8500." The decision was that the acceptance was conditional upon the receipt of the bill of lading, but in the course of giving the judgment of the Court of Appeal Townsend J. said: "The request to pay was conditioned upon the delivery of the flax seed and plaintiffs' acceptance of the draft was conditioned upon the delivery of the indorsed bills of lading for it." The cases of *Munger* v. *Shannon* (3) and *Brill* v. *Tuttle* (4) were cited in support of the judgment. It is clear from the judgment that great stress was laid upon the form of the acceptance, and I am not

(1) 91 U. S. 92.
(2) 114 Fed. Rep. 433.
(3) (1874) 61 N. Y. 251.
(4) 81 N. Y. 454.

quite sure that if the acceptance had been unconditional the judgment would have been the same, although in one passage the Court does certainly say the request to pay was conditional upon the receipt of the flax. I note in passing, and in view of my earlier remarks, that the draft was payable sixty days after sight. These cases are, I own, not quite as convincing to my mind as they seem to have been to Noyes J.; but there is still another case to which I must refer, namely, the case of *Springs* v. *Hanover National Bank* (1), decided by the New York Supreme Court of Appeal in 1913. The question there was whether the lithographing of the word "cotton" on a draft together with the attachment of the bill of lading to the draft affected its negotiability. Held that it did not. The importance of the judgment, again delivered by Hiscock J., is that he cited with approval *Hannay* v. *Guaranty Trust Co.* (2), which is the decision of Noyes J. upon demurrer to which I have just referred. During the argument of this case counsel for the plaintiffs urged that the judgment of the New York Court of Appeal amounted to an estoppel against the defendants, and that the Court must be taken to have decided not only that the case was governed by English law, as they clearly did, but by implication that the judgment of Noyes J. was wrong in American law. I was clearly of opinion that their judgment could not be so construed, and was only an estoppel upon the point actually decided, but I expressed the view that one might infer from their judgment that they disapproved of the judgment of Noyes J. as an exposition of the American law. Upon reflection I see no ground whatever for that opinion, and I withdraw it. I find myself then in this position. There is a body of evidence of equally competent witnesses both ways. There are decisions which seem to me to point both ways. There are the soundest business reasons for deciding that the law on this important commercial matter should be the same in both countries. It was apparently intended by the American Legislatures that it should be the same, as is evidenced by the adoption of the English Bills of Exchange Act by a large number of American States. It is obvious from the evidence of the witnesses and a perusal of the cases that our English authorities are well known in America, and yet there is

(1) (1913) 209 N. Y. 224. (2) (1911) 187 Fed. Rep. 686.

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the decision of Noyes J. upon this very instrument quoted, by the New York Court of Appeal as lately as December, 1913, as an authority for the point decided. It is further a matter not to be overlooked that the judgment of the Court of Appeal in *Amsinck* v. *Rogers* (1) was delivered by Hiscock J., who a few months afterwards delivered the judgment of the Court in *Hibbs* v. *Brown* (2), citing *Lowery* v. *Steward* (3) and *Brill* v. *Tuttle* (4) with approval. He can hardly have forgotten *Amsinck* v. *Rogers* (1) or have thought *Lowery* v. *Steward* (3) or *Brill* v. *Tuttle* (4) inconsistent with it, and he it is who delivered the judgment of the Court of Appeal in *Springs* v. *Hanover National Bank* (5), citing Noyes J.'s judgment as authoritative. Further, *Hibbs* v. *Brown* (2) is two years later than *Waddell* v. *Hanover National Bank* (6), a decision of which the New York Court of Appeal could hardly have been ignorant. When American cases are cited in English Courts, as they often are, upon questions involving the decision of English law, they are treated with the utmost respect and as valuable guides, but they are not binding upon our Courts, and we do not always follow them. When the question is one of American law, and the opinion of experts differ and the American cases cited are in conflict, an English judge would, I presume, treat them in the same way as he does conflicting English decisions of equal authority and follow the cases which seem to him in accordance with principle. The position here, however, is different. I have an express decision of an American judge on the construction of the very document which I am called upon to construe by American law—a decision, too, approved by the New York Court of Appeal.

Under these circumstances, and impressed as I am with the view that in America the Courts do not confine themselves as closely as do our Courts to the instrument itself, but continue to examine the surrounding circumstances as they did before their adoption of our Bills of Exchange Act, I feel that I, sitting as a judge of first instance, must accept the opinion of Noyes J. and hold that this instrument is in American law not negotiable. The result is that

(1) 189 N. Y. 252.
(2) 190 N. Y. 167.
(3) 25 N. Y. 239.
(4) 81 N. Y. 454.
(5) 209 N. Y. 224.
(6) 48 N. Y. Miscel. Rep. 578.

I cannot make the declarations asked by the plaintiffs, and that the defendants' counter-claim, as amended, is good.

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Judgment for the defendants.

Solicitors for plaintiffs: *Crossley & Burn.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

J. F. C.

HAWKEY, APPELLANT *v.* STIRLING, RESPONDENT.

1917

Oct. 19.

Sunday Observance—Amusement Caterer—Sale of Goods—"Tradesman"—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *s.* 1.

The appellant carried on the business of an amusement caterer on weekdays and Sundays at premises where any one who chose played at certain games, paying the appellant for the use of the implements employed in the games. In the event of a player achieving a certain result, he received an article from the appellant. Shooting at targets also took place on the premises, the guns or rifles used for the purpose being loaded with cartridges which were supplied by the appellant for payment in money:—

Held, that the appellant was a "tradesman" within s. 1 of the Sunday Observance Act, 1677, and was, therefore, liable to be convicted under that section for having exercised the business or work of his ordinary calling upon a Sunday.

CASE stated by the stipendiary magistrate of Grimsby.

An information was preferred by the chief constable of Grimsby, the respondent, against John Hawkey, the appellant, for that the appellant on Sunday, February 25, 1917, being then an amusement caterer, did unlawfully do and exercise certain worldly labour, business, and work in his ordinary calling of an amusement caterer upon the said date, the same not being a work of necessity or charity, contrary to 29 Car. 2, c. 7. (1)

(1) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1: "No tradesman, artificer, workman, labourer, or other person whatso-

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Upon the hearing of the information the following facts were proved:—The appellant was the tenant and occupier of a shop, No. 94, Freeman Street, Grimsby, which was a street consisting principally of tradesmen's shops with residential quarters behind and above them. The ordinary calling carried on there by the appellant was the supply for money of the materials for "houp-la," darts, rings, shooting with a gun or rifle, and other things of a like character, and there were also a number of automatic machines which worked in various ways on placing a penny in the slot. "Houp-la" consisted of a board on which a number of articles were placed; the customer was supplied for money with a certain number of wooden rings, and, standing at a distance of three or four feet, attempted to throw the rings over the articles. If he succeeded in throwing a ring so that it fell quite flat on the board round one of the articles, the article became his property; otherwise he got nothing. "Rings" consisted of a large board fixed upright on a wall with hooks upon it. The customer was supplied with rings at the rate of four a penny, and, standing at a short distance, attempted to throw the rings so that they remained hanging upon the hooks. If the customer got two out of the four rings on the hooks he became entitled to receive, and received, a packet of cigarettes, or a packet of sweets; otherwise he got nothing. "Darts" consisted of a board upon the wall with numbered spaces upon it. The customer was supplied for money with a certain number of darts and attempted to throw the darts so that they might stick in the spaces. If the aggregate of the numbers so hit exceeded a certain number he got a prize; otherwise he got nothing. At the shooting stand the customer was supplied with a gun or rifle and with five cartridges for 3*d.*, or ten for 6*d.*, and could shoot either at an ordinary target or at a row of pieces of iron in the shape of tobacco pipes, or at a row of larger oblong pieces of iron called "Huns." The customer did not in any case receive anything further here. In all these cases, except "houp-la," if there were more customers than one in company, the attendant in quoting the price added, "The loser pays," and this was generally done.

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ever, shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity and charity only excepted) . . . ."

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On Sunday, February 25, 1917, business was being carried on in the shop by the appellant and his assistants in the same manner as on a weekday, and the shop was visited by a very large number of soldiers, sailors, youths and boys.

In cross-examination of the police inspector and three police constables, who were on duty at or about the premises, the appellant's solicitors elicited, as the facts were, that the customers did not take the rings and darts away with them; that the cartridges were placed in the guns by the proprietor or an attendant, and that the customers did not touch the cartridges; that "houp-la" was more a matter of luck than skill, as the ring when thrown over the article generally remained tilted against it, and no skill could make it fall flat on the board, but luck only, and that men under the influence of drink had been seen to be successful; that there were notices in the shop, "We reserve to ourselves the right to refuse admission," "Loitering not allowed," "Although admission is free the public are requested to contribute to the upkeep of the establishment," "Nothing is sold here"; that they had not seen any notice that the naval authorities had placed these premises out of bounds for men of the Navy, but that they had heard and believed that that was the case.

It was contended by the chief constable:—(1.) that the appellant was a tradesman within the meaning of the Sunday Observance Act, 1677; (2.) that the cartridges were sold to the customers and delivered to them and consumed by them in the use; (3.) that there was a sale of the right to use the other things on the premises; and (4.) that the appellant's mode of obtaining his living by providing these various things and taking money for them and for the use of them was a trade within the meaning of the word "trade" in its ordinary use and as defined in the standard dictionaries and within the meaning of the Sunday Observance Act, 1677.

The appellant did not give or tender any evidence, but it was contended by his solicitor: (1.) that an amusement caterer is not a tradesman within the meaning of the Act; (2.) that the evidence showed that the public were allowed to use the various articles for their own amusement, for which use they paid a consideration, and that there could not in the circumstances be said to be any sale or trade; (3.) that there was not a sale of the cartridges, which were

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never touched by the customer; (4.) that the appellant was not a tradesman because he neither bought nor sold anything: *Palmer* v. *Snow*. (1)

The magistrate found that there was a sale of the cartridges which were used at the stand, and a sale of the articles on the "houp-la" table and of the articles received by the rings and darts customers, subject to the performance of a condition precedent. He found that the appellant was a tradesman. He held that upon the evidence, whether there were sales or not, the appellant was a tradesman within the meaning of the Sunday Observance Act, 1677, and he convicted and fined the appellant.

The question for the opinion of the Court was whether the magistrate, upon the above statement of facts, came to a correct determination and decision in point of law.

Disturnal, K.C., and *Sandlands*, for the appellant. The appellant is not a tradesman or a person ejusdem generis within the meaning of the Sunday Observance Act, 1677. To constitute a person a tradesman the essential part of his business must be the trafficking in goods. The appellant's business is that of an amusement caterer; as an incident of that business goods are in certain cases supplied by him to persons who have paid him money. Even assuming that those goods can be regarded as having been sold by him, that does not of itself make him a tradesman. In the case of the shooting gallery it is impossible to say that the cartridges have been sold to the person who is intending to shoot. It was considered necessary to deal with persons keeping places of amusement by the Sunday Observance Act, 1781 (21 Geo. 3, c. 49), presumably because they were not within the Act of 1677. [*Palmer* v. *Snow* (1) and *Reg.* v. *Silvester* (2) were referred to.]

Sir A. Bodkin, for the respondent. The word "tradesman" in the Act of 1677 means a person who is carrying on a business, and a person may be a tradesman who does not sell, e.g. a dyer or a laundress. But in any case there was evidence on which the magistrate could find that the appellant did sell, both the articles supplied to the successful players at the games, and also the cartridges used

(1) [1900] 1 Q. B. 725. (2) (1864) 33 L. J. (M.C.) 79.

for the shooting. [He referred to *Slater* v. *Evans* (1) and *Rex* v. *Younger*. (2)]

Disturnal, K.C., in reply cited *Sandiman* v. *Breach*. (3)

DARLING J. In my opinion the magistrate came to a right conclusion in this case. The intention of the Sunday Observance Act, 1677, as expressed in the Act, was that all persons shall "apply themselves to the observation of" the Lord's day "by exercising themselves thereon in the duties of piety and true religion, publicly and privately"; and having regard to that language it is obvious that those who passed the Act would have condemned, and put a stop to, the kind of business which was being carried on by the appellant, who called himself an amusement caterer. In carrying on that business he does that which in my opinion makes him a tradesman, or a person ejusdem generis, within the meaning of the Act. With regard to the games of "houp-la," rings, and darts, persons paid money to the appellant in the hope of receiving some article for it, and many of them did receive something. It was possible that every time a person played at one of those games the appellant would have had to hand over to him an article in return for the money paid, and the person receiving the article was in the position of having bought it. That did not in fact occur in every case, and it might be that as regards an article handed over to a winner the appellant was selling it at a loss, but he recouped himself for that loss by receiving money from other persons for which they received nothing. The result of the whole transaction was that the appellant was selling goods, and he was therefore a tradesman.

With regard to the shooting the case is not quite so clear, but the facts stated in the case are sufficient to show that the cartridges did become the property of the person paying the money, though possibly subject to a condition that he should fire them out of a gun on the appellant's premises.

The appellant was rightly convicted and this appeal must be dismissed.

AVORY J. I agree. In my opinion there was evidence on which the magistrate could come to the conclusion that the appellant was

(1) [1916] 2 K. B. 403. (2) (1793) 5 T. R. 449.
(3) (1827) 7 B. & C. 96.

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a tradesman within the meaning of this Act, in the sense that he was a person who was trafficking in goods. That is sufficient to dispose of the case, and I prefer not to express any opinion as to the details of the evidence.

SANKEY J. I agree.

Appeal dismissed.

Solicitors for appellant: *Clarkson & Co., for John Barker, Great Grimsby.*

Solicitor for respondent: *P. Conway, for J. W. Jackson, Grimsby.*

F. O. R.

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Oct. 23.

THE KING *v.* LONDON COUNTY COUNCIL. *Ex parte* CORRIE.

London—Management—Parks—By-law—Discretion—Sale of Literature—Consent of Public Authority—Resolution to refuse Consent—Mandamus.

The London County Council, in exercise of statutory powers, made a by-law relating to parks, gardens, and open spaces whereby the selling of any article without the consent in writing of the Council was constituted an offence. After granting permission to sell literature at meetings in certain parks, they passed a resolution that the existing permissions should be determined and that no new permission should be granted thenceforth. Acting on this resolution they refused an application made by a certain society for permission to sell pamphlets at its meetings in one of the parks:—

Held, that there was vested in the London County Council by virtue of the by-law a discretion similar to that of justices at licensing sessions, and that they did not properly exercise that discretion by passing a general resolution to grant no permission and acting on that resolution.

Rule made absolute for a mandamus to hear the application.

Reg. v. *Sylvester* (1862) 31 L. J. (M.C.) 93 applied.

RULE NISI for a mandamus to the London County Council commanding them to hear and determine, pursuant to the statutes in that behalf, an application by one Linda Corrie, the prosecutrix,

for their consent under No. 27 of No. 1 of their by-laws relating to parks, gardens, and open spaces made pursuant to the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.) (1), to the sale of a pamphlet entitled "The British Blind" in the parks belonging to the County Council in connection with public meetings in such parks held by the National League of the Blind of Great Britain and Ireland.

The ground for the rule nisi was that the Council could not, by general resolution to refuse consent in all cases, fetter their discretion to give or refuse consent on a particular application for consent.

The prosecutrix was the wife of Frederick David Corrie, of Junction Road, Holloway. From her affidavit on the motion for the rule nisi the following facts appeared:—

1. The prosecutrix was the secretary of the West London branch of the National League of the Blind, which has its office at the

(1) London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 14: "It shall be lawful for the Council from time to time to make alter and repeal in relation to the parks gardens and open spaces vested in or under the control of the Council by-laws for all or any of the purposes for which under ss. 3 and 4 of the Metropolitan Board of Works Act, 1877, they are authorised to make by-laws whether as regards the parks or the heaths and commons as referred to and defined in that Act which purposes shall (without restricting the generality of this enactment) be deemed to extend to and include the various matters set out in Schedule B to this Act:

"For the purpose of this part of this Act and of the Schedule B to this Act the expression 'park garden or open space' includes every park heath common recreation ground garden ornamental enclosure or open space now or hereafter vested in or under the control of the Council."

SCHEDULE B.

"*Subjects of General By-laws for Parks, Gardens and Open Spaces* . . . .

"29. Selling any article or distributing any bill or like thing without the consent of the Council in writing under the hand of their clerk."

Metropolitan Board of Works Act, 1877 (40 Vict. c. viii.), s. 3: "The Board may, subject to the provisions of this Act, from time to time make by-laws as regards the parks for all or any of the following purposes; (that is to say,)

"(1.) Their government, control and management and the preservation of order and good conduct among persons frequenting them . . . ."

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REX v. LONDON COUNTY COUNCIL. CORRIE, *Ex parte.*

White Hart Hotel, Windmill Street, Tottenham Court Road, in the county of London. On June 19, 1917, she made an application in writing for permission to sell pamphlets of the society at meetings held by the society in Finsbury Park and on Parliament Hill.

2. In reply she received a letter dated June 19, 1917, which concluded as follows: "The sale of literature at the Council's parks and open spaces is not now allowed."

3. On or about July 6, 1917, she again wrote to the chief officer of the Parks Department of the London County Council explaining that the society of which she was the secretary did not wish to sell literature in the ordinary way, but to sell a pamphlet, of which she enclosed a copy, solely for the benefit of the society's funds, and again asking for permission.

4. She received the following reply: "July 9, 1917. Madam,—In reply to your letter (undated) I have to state that the Council has decided that no permits for the sale of literature at the Council's parks and open spaces are to be issued. I regret that it is not possible to make exception to this rule even in a most deserving case. (Signed) F. W. Parker, Second Officer."

5. The by-laws relating to parks and open spaces contain the following: "I. The acts and things specified in the following clauses, numbered 1 to 41 respectively, are hereby prohibited and declared to be offences . . . . 27. Selling or letting for hire any article, or distributing any bill or like thing, or placing any chair or seat for hire without the consent of the Council in writing under the hand of its clerk." The affidavit proceeded as follows:—

"6. It appears that the refusal of the officer of the Parks Department to grant the permit for the sale of the said pamphlet is in accordance with the resolution passed by the London County Council on May 30, 1916, in the words and figures following:—'That the existing permits to sell literature at meetings at certain parks and open spaces under the control of the Council be determined as from September 30, 1916, and that no new permits be issued after that date.' For 25 years and upwards prior to the passing of the resolution set out in paragraph 6 herein it was, I am informed and believe, the practice of the London County Council to issue permits for the sale of literature at meetings held in parks and open spaces.

"7. I humbly submit that the London County Council or its proper officer must take into consideration the nature of the pamphlet which I submitted and determine judicially whether it is a fit and proper pamphlet to be sold in the parks in connection with the meetings of the National League of the Blind and must issue the said permit for the sale thereof unless they should determine judicially that the said pamphlet is an improper one to be sold in connection with the said meeting. Sworn," &c.

The affidavit of the clerk to the County Council showing cause against the rule contained the following paragraphs :—

"5. At a meeting of the Council held on May 30, 1916, the Parks and Small Holdings and Allotments Committee of the Council, hereinafter called the Parks Committee, presented a report of which the part material to the present application was as follows :— 'No. 27 of the by-laws governing the management of parks and open spaces under the control of the Council prohibits the sale of any article at those places without the consent of the Council. Under this by-law permits to sell literature have been issued from time to time, but such sale is confined to the sites on which public meetings are held.

"'For some time past, however, we have entertained doubts as to the necessity for allowing the sale of literature, even to this limited extent, as there are such ample facilities for obtaining books and other forms of literature elsewhere and we cannot eliminate the possibility of the parks being utilized for the purpose of private gain or profit. After giving the matter full consideration we have come to the conclusion that, in the public interest, it is desirable that the issue of the permits should be discontinued, thus bringing the Council's policy in this matter into line with that adopted at the Royal parks. We suggest that the existing permits to sell literature should be annulled as from the end of September, 1916. It is not proposed to vary the practice of issuing, under another provision of the same by-law, permits to distribute literature at meetings free of charge. We recommend that the existing permits to sell literature at meetings at certain parks and open spaces under the control of the Council be determined as from September 30, 1916, and that no new permits be issued after that date.'

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"6. The said report was received and approved by the Council at the said meeting and the recommendation therein contained became a resolution of the Council.

"7. In pursuance of the said resolution all permits then existing for the sale of literature at meetings in the Council's parks were determined as from September 30, 1916, and no new permit has been issued since that date."

The affidavit went on to state that representations had been made to the Council by various societies and that the Council referred the matter to the Parks Committee, who on May 11, 1917, reported as follows:—

"Apart from the merits of the question, we understand that, owing to the depletion of staff, it would be impracticable, during the period of the war, to modify the resolution of the Council of May 30, 1916, to issue no further permits for the sale of literature and we have therefore decided to postpone the further consideration of the matter until after the declaration of peace."

This report was received and approved by the Council. It was in consequence and in pursuance of the resolution of May 30, 1916, that the application of the prosecutrix was refused.

A rule nisi having been obtained as aforesaid,

Sir Ernest Pollock, K.C. (*Craig Henderson* with him), showed cause. The granting of leave to sell literature in the public parks is a matter within the discretion of the County Council. A mandamus will not lie to command them to exercise their discretion in any particular way: *Reg.* v. *Lewisham Union* (1); *Julius* v. *Bishop of Oxford.* (2)

Macmorran, K.C., and *W. H. Eldridge*, in support of the rule. The discretion of the County Council in giving or withholding their consent is like that of justices at licensing sessions in granting or refusing a certificate for a licence to sell intoxicating liquors. It has been held that justices cannot pass a general resolution to refuse a certificate to every applicant for an ale and beer house licence who refuses to take out also a licence for the sale of spirits: *Reg.* v. *Sylvester* (3); *Sharp* v. *Wakefield.* (4) They must consider

(1) [1897] 1 Q. B. 498.
(2) (1880) 5 App. Cas. 214, 241.
(3) 31 L. J. (M.C.) 93.
(4) [1891] A. C. 173, 180.

each application on its merits. So in this case the County Council do not properly exercise their discretion by passing a resolution that they will not consent to the sale of literature in the parks under their control. They must hear the application of the prosecutrix and decide it on its merits.

Sir Ernest Pollock, K.C., in reply. The analogy of justices at licensing sessions is not a true one. A licence to sell intoxicating liquors is a kind of property. The licensing district is not vested in the justices as the parks are in the County Council. There is no prima facie right at common law to sell goods on the property of another; there is prima facie a right at common law to sell goods, including intoxicating liquor, in the vendor's own house.

DARLING J. This rule must be made absolute. The Court can come to no other decision without infringing the principles governing the hearing of applications for licences to sell intoxicating liquors. It has been laid down that the body on whom is conferred the jurisdiction of granting such licences must hear each application on its merits and cannot come to a general resolution to refuse a licence to everybody who does not conform to some particular requirement. It is not true to say that these parks are the property of the County Council in the sense that a man's house is his property. They are only the property of the Council for the public benefit and for purposes of control and management. By s. 14 and Sched. B, s. 29, of their General Purposes Act of 1890 the Council may make by-laws relating to the selling of any article without their written consent, and they have made a by-law, No. 27, by force of which it is an offence to sell any article without such consent. Without that by-law it would be no offence, except perhaps a trespass, to sell a book in a park. The prosecutrix is a person who wishes to sell a book without committing an offence. She has a right to ask the Council for their consent. The Council refuse to hear her application. They have passed a general rule to the effect that no one shall sell books in the parks. So the prosecutrix comes to this Court for a mandamus to command them to hear her application to be allowed to do that which without their consent would be unlawful. In my view this case is not like *Reg.* v.

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Lewisham Union (1), but is within the principle of the licensing cases, and the applicant has a right to move the Court in this form. The rule must be made absolute.

AVORY J. I have come to the same conclusion, though somewhat reluctantly, because I doubt whether the rule will be of any effective service to the prosecutrix, inasmuch as, when the application for permission is considered, the Council will probably refuse to give it. We have to decide whether the prosecutrix has any legal right which is being withheld. I think she has a legal right to have her application considered. From the affidavit filed on behalf of the Council it appears that the application was refused in consequence and pursuance of the resolution of May 30, 1916, that no new permits were to be granted after September, 1916. Sir Ernest Pollock was invited to point out any distinction in principle between that refusal and the refusal to grant the licence in *Reg.* v. *Sylvester*. (2) He failed to satisfy me that there is any valid distinction. It is unlawful to sell intoxicating liquor without a justices' certificate and a licence; it is unlawful to sell any article in a park without the consent in writing of the Council. In exercising their functions justices cannot pass a general resolution to refuse certificates; that is not a judicial exercise of their discretion. Similarly in the present case there has not been a judicial exercise of the discretion which is vested in the County Council. The analogy seems to be complete. The by-law, whether it be made under s. 3 of the Metropolitan Board of Works Act, 1875, or under the General Powers Act of 1890, does not empower the Council to forbid the sale of articles altogether, but only a sale without the consent of the Council.

I desire to add that I do not assent to the submission of the prosecutrix that the County Council must give their consent unless they determine that the pamphlet is an improper one to be sold in parks in connection with meetings of the National League of the Blind. No such duty is cast upon them by the by-laws. They may refuse their consent although, as an article, no exception can be taken to the pamphlet which it is proposed to sell.

(1) [1897] 1 Q. B. 498. (2) 31 L. J. (M.C.) 93.

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SANKEY J. I agree. Before we deny a person his prima facie right to be heard we ought to be satisfied that his right has been taken away. I am not satisfied that the Legislature intended to take away the right of the prosecutrix by enabling the County Council to pass a general resolution depriving her of that right. The right to be heard is one of those public safeguards which we should always struggle to preserve.

Rule absolute.

Solicitor for prosecutrix: *Chalton Hubbard.*

Solicitor for London County Council: *Edward Tanner.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A. 1917 *Oct.* 15.

RONDEAU, LE GRAND & CO. *v.* MARKS. LOUIS MARKS, CLAIMANT.

[1913 R. 1660.]

Husband and Wife—Judgment against Wife—Agreement that all Wearing Apparel provided by Husband for Wife shall be his Property—Validity of Agreement.

A husband is bound to provide his wife with necessary apparel, but is not bound to give it to her. He may make the provision either by giving it to her in accordance with the common practice, or by lending it to her. Therefore an agreement between husband and wife that all articles of wearing apparel used or worn by the wife were to be purchased by the husband in his own name and on his credit and were to be his absolute property, and that he was to be entitled to dispose of them as and when and how he pleased, his wife having no right or title to them except to wear them during his pleasure, is valid in law, and effectual as against the execution creditors of the wife.

Judgment of Bailhache J. [1917] 2 K. B. 636 affirmed.

APPEAL from the judgment of Bailhache J. on a special case. (1) The case was stated by a Master of the High Court in an interpleader issue referred to him in respect of a claim by a husband to the property in his wife's clothing and articles of attire as against

(1) [1917] 2 K. B. 636.

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execution creditors on a judgment obtained by them against the wife on December 21, 1915.

1. The claimant, Louis Marks (the husband of the judgment debtor), claimed all his wife's dresses, clothing, and wearing apparel on the ground that in July, 1914, he made an agreement with his wife by which it was agreed that all dresses, articles of clothing, and wearing apparel which were to be used or worn by his wife were to be purchased by the claimant in his own name and on his credit, and that the dresses, articles of clothing, and wearing apparel when purchased were to be the absolute property of the claimant, and that he was to be entitled to dispose of them as and when and how he pleased, his wife having no right or title to them, except to wear them during his pleasure. The Master found the agreement proved and that the dresses and wearing apparel were bought by the claimant and used by his wife on the terms contained in the agreement.

2. It was contended by the execution creditors that such alleged agreement was in fraud of creditors; that it was contrary to public policy; that it was void for want of consideration; that it was invalid in law, and was not such an agreement as the law would recognize as binding and effective.

The question for the opinion of the Court was whether such an agreement was valid in law or not.

The opinion of the Court and such order as the Court should think fit to make as to the costs of the special case and the hearing thereof were to be remitted to the Master so that he might finally dispose of the reference.

Bailhache J. held that the agreement was valid.

The execution creditors appealed.

Schiller, K.C., and *J. D. Crawford*, for the execution creditors. A husband cannot discharge his common law obligation to provide his wife with necessary articles of clothing by lending them to her. He must supply her with clothes and cannot reserve to himself the right, as he has done by the agreement in the present case, to take them away from her at any time he pleases. If he could do so, he might at any moment leave her without necessary clothing. Such an agreement is against public policy and is invalid. The obligation

of the husband is to supply her with clothes which are necessary for her station, and the clothes when supplied become her separate property. This agreement is in substitution for the husband's common law obligation, and the wife gives up the right to pledge his credit. The husband's common law obligation is laid down in Bac. Abr., 7th ed., vol. 1, tit. Baron and Feme (H.), p. 713; *Read* v. *Legard*. (1) It is an attempt by the husband to get rid of his common law obligation, and is invalid. The wife has now, under the Married Women's Property Act, 1882, the power of holding property. The dictum of Farwell L.J. in *Masson, Templier & Co.* v. *De Fries* (2) that "husband and wife can now make their own arrangements and make them binding as contracts: the husband may impose what conditions he pleases on making a gift to his wife, and husband and wife may make what bargains they please, not being in fraud of creditors or otherwise illegal," is too wide. A condition attached to an absolute gift which is inconsistent with and repugnant to the gift is void, and the donee takes the gift free from the condition: Halsbury's Laws of England, vol. 15, par. 837. Further, there was no consideration for the agreement, and upon that ground it is invalid. There was no consideration for the wife giving up her common law right. [Com. Dig., 5th ed., vol. 2, p. 551 (2 M. 11), and *Powell* v. *Hankey* (3) were also referred to.]

D. M. Hogg, K.C., and *Lowenthal*, for the claimant, were not called upon.

PICKFORD L.J. In my opinion the judgment of Bailhache J. is right. The case has been argued to a great extent upon some such footing as this: Assume that the property in these goods would have been in the wife but for this agreement, is the agreement to take them away from her valid? I do not think that that is the proper way of putting the question, and I say so for the reasons given by Bailhache J. There lies at the root of that assumption this proposition, that the obligation of a husband to provide clothes for his wife can only be performed by his giving her the clothes, and that he does not discharge his obligation by lending them to her.

(1) (1851) 6 Ex. 636. (2) [1909] 2 K. B. 831, 838.
(3) (1722) 2 P. Wms. 82.

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In my opinion the husband is not under any such obligation. Before the Married Women's Property Act, 1882, such an obligation did not exist. That Act gave the wife the right to acquire property of her own, but it does not say that clothes bought for her with her husband's money now necessarily become her property. In my opinion the husband discharges his legal obligation to his wife so long as he provides her with clothes either by giving or lending them to her. I agree with Bailhache J. that in ordinary cases where a husband provides clothes for his wife the presumption is that he intends to give them to her, but I see nothing to prevent that presumption being rebutted. The conversation between husband and wife which rebuts that presumption may be called an agreement, but it does not follow that there is attached to it all the legal incidents of an agreement, as, for instance, the necessity of consideration to support it. In this case the husband and wife agreed—using the word in its popular sense—that the provision for her should be by lending and not by giving the clothes. The fact that there was attached to the loan a right in the husband to repossess himself of the clothes as and when he pleased did not affect his common law obligation to provide necessary clothing for his wife. If he took away the clothes and left her without any clothing at all, he would come under an obligation to provide clothes for her, either by lending or giving them to her. The only question we are asked in the case is whether the agreement is valid in law or not. I can see nothing to make it invalid. I am dealing with the case apart from any question as to what might be necessary to take the property out of the wife if it had ever been in her. The obligation of the husband being to provide his wife with clothes either by giving or by lending them to her, there is nothing to prevent them from coming to an agreement that the husband shall provide her with clothes by lending them to her. It has been urged that we are asked by the special case whether this is such an agreement as requires consideration to support it. I do not think that that is intended by the case. I think it is intended to ask the Court whether that which took place between the husband and wife constituted such a state of things as that the property in the clothes is in the husband and not in the wife. I think that it did, and that what took place between husband and wife was valid. I therefore

answer the question by saying that the agreement was valid in law. The appeal must be dismissed.

BANKES L.J. I agree. The case has been argued as though this so-called agreement excluded the husband's common law obligation to provide his wife with necessary clothing. I do not so interpret what took place between husband and wife. It seems to me to amount to this: The husband says to the wife, "I will provide all your clothes, and as by so doing I shall be fulfilling my common law obligation you must undertake not to pledge my credit"; and the wife agrees. The husband then says, "You shall have no right of property in any of the clothes so provided; you shall have the right to wear them during my pleasure"; and she agrees. Whether that is treated as an agreement in the strict legal sense, as it is argued we must do, or whether it is treated as an agreement in the colloquial sense of a statement to which both husband and wife assent, seems to me to be immaterial. If it were necessary to treat it as a legal agreement requiring consideration to support it, I think I can see sufficient consideration; the agreement, as I read it, including clothes other than and beyond those which would be covered by the husband's common law obligation. But however that may be, I take the same view as Bailhache J. did, namely, that this so-called agreement is operative in the sense of being an arrangement between husband and wife as to the rights which she shall exercise in respect of clothes provided for her by her husband, and falls short of a strict legal agreement which requires consideration to support it. On these grounds the appeal fails.

SARGANT J. I am of the same opinion. I think that the point raised by the special case can be interpreted by the contentions set out in paragraph 2: "It was contended by the execution creditors that such alleged agreement was in fraud of creditors;"—that is, in fraud of the wife's creditors—"that it was contrary to public policy; that it was void for want of consideration"; and so on. That obviously assumes that the property in the goods at one time was in the wife, and the contention is that the effect of the agreement is to deprive her of her ordinary powers of dealing with the goods, and to cut down her rights to those which the learned judge has

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found that she possesses, and that that renders the agreement invalid. But in fact the goods were purchased by the husband, and therefore were prima facie his property. Whether or not the agreement is one which can be enforced in every respect, it certainly is sufficient to prevent the ordinary presumption arising under which the clothes might be supposed to have been given by the husband to the wife. And, therefore, if the agreement is in any way invalid, the result merely is that the goods remain the property of the husband who purchased them.

But assuming for a moment—an assumption which I do not think is well-founded—that the wife might have complained of this agreement and might have claimed to be provided with clothes which should be her absolute property, does that give the execution creditors of the wife any right to claim that these particular goods, with regard to which the agreement was made, were the property of the wife for the purpose of providing a fund for the payment of her debts? It seems to me that such a contention has only to be stated to be answered. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for execution creditors: *Cohen & Cohen.*
Solicitor for claimant: *W. B. Glasier.*

W. F. B.

EDELSTEN, APPELLANT *v.* LONDON COUNTY COUNCIL, RESPONDENTS.

1917
Oct. 18, 19.

Local Government—Employment Agency—Refusal of Licence—Appeal—Procedure—London County Council (General Powers) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c. cxxix.*), *s.* 22, *sub-s.* 5—*Summary Jurisdiction Rules,* 1915, *r.* 58.

Sect. 22, sub-s. 5, of the London County Council (General Powers) Act, 1910, gives a right of appeal to a metropolitan police magistrate from the refusal of the licensing authority to grant a licence to carry on an employment agency, provided (inter alia) that not less than four days' notice of the appeal is sent to the licensing authority.

By r. 58 of the Summary Jurisdiction Rules, 1915, where there is a right of appeal to a police magistrate against a decision of any local or other authority, the procedure shall be by way of complaint for an order, and the Summary Jurisdiction Acts shall apply to the proceedings:—

Held by Darling and Avory JJ., Sankey J. dissenting, that the effect of r. 58 is to repeal by implication so much of s. 22, sub-s. 5, of the Act of 1910 as requires four days' notice of an appeal under that section.

Reg. v. *Glamorganshire Justices* (1889) 22 Q. B. D. 628 applied.

CASE stated by a metropolitan police magistrate.

On March 30, 1917, an appeal by complaint by the appellant against the respondents came on for hearing before the magistrate, wherein the appellant complained that the respondents, as the licensing authority under Part V. of the London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.) (1), did on March 16, 1917, refuse to grant to the appellant a licence authorizing

(1) London County Council (General Powers) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxxix.), s. 20, provides that no person shall carry on an employment agency without a licence from the licensing authority, i.e., the London County Council.

Sect. 22, sub-s. 5: "Any person who deems himself aggrieved by the refusal of the licensing authority to grant or renew a licence to him may appeal in the case of an employment agency . . . . to a metropolitan police magistrate provided that such appeal is made within fourteen days from the date of such refusal and that not less than four days' notice in writing of such appeal is sent to the licensing authority."

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him to carry on an employment agency, and that the appellant deemed himself aggrieved by that refusal. The magistrate dismissed the appeal, subject to this case. The facts were as follows :—

The appellant applied on March 16, 1917, to the Public Control Committee of the London County Council, to which committee has been delegated the duties of the Council in respect of employment agencies under the Act of 1910, and on the same day the committee refused to grant to the appellant an employment agency licence. On March 17 the decision of the committee was communicated to the appellant by letter which he received on March 19, 1917. The appellant thereupon on March 21, 1917, applied for a statement of the grounds of the refusal in pursuance of s. 22, sub-s. 4, of the Act of 1910, which request was complied with, and the statement of the grounds was received by the appellant on March 24, 1917. On March 24 the appellant by his solicitor appeared at the Bow Street Police Court and appealed to the magistrate then sitting and applied for a summons to the respondents in accordance with the usual practice in such cases, whereupon the appeal by complaint was fixed to be heard on March 30 at Bow Street Police Court. On the same day (March 24, 1917) the appellant gave to the respondents a notice that he intended to appeal against the refusal to the magistrate sitting at the Bow Street Police Court on March 30, 1917. On March 30, on the matter being called on, the respondents objected that there was no jurisdiction in the magistrate to hear the appeal by reason of the fact that the terms of s. 22, sub-s. 5, of the Act of 1910 had not been complied with, as that such sub-section required not only that the appeal should be made within fourteen days from the date of the refusal (which it was admitted had been complied with), but also that the appellant should send not less than four days' notice in writing of his appeal to the licensing authority. It was admitted that no other notice had been sent than the notice above referred to.

On the part of the appellant it was contended that the last-mentioned notice was a compliance with sub-s. 5 of s. 22 of the Act of 1910 as it had been sent not less than four days before the day on which the summons had been made returnable.

The magistrate was of opinion that the appellant had not complied with the provisions of sub-s. 5 in that the notice dated March 24,

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1917, was sent on the day that he appealed by complaint to this Court, whereas the sub-section provided that he should give to the respondents four days' notice in writing of the appeal, and the magistrate accordingly dismissed the appeal.

The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct decision in point of law.

H. S. Simmons, for the appellant. The appellant, by giving notice to the respondents on March 24 that he intended to appeal on March 30, complied with the requirement of s. 22, sub-s. 5, of the Act of 1910. The appeals under this Act are now governed by r. 58 of the Summary Jurisdiction Rules, 1915 (1), and it is not necessary that an appellant shall give four days' notice of his intention to apply for a summons, for he is entitled to that as of right, and the respondents would have no locus standi, and could do nothing, on the hearing of that application. The "appeal," within the meaning of s. 22, sub-s. 5, is the hearing of the appeal by the magistrate, and as the respondents received a notice more than four days before the hearing the Act was complied with and the magistrate had jurisdiction to hear the appeal.

Douglas Hogg, K.C., for the respondents. The magistrate was right in holding that four days' notice must be given of the application for the summons. From the passing of the Act in 1910 till r. 58 of the Summary Jurisdiction Rules, 1915 (1), was made, the practice was to give four days' notice of the proposed appeal and then for both parties to attend before the magistrate to obtain the appointment of a day for the hearing. Rule 58 has not affected that practice. The application for the summons is "the appeal" of which the four days' notice is to be given. An appeal and the hearing of the appeal are different things. In the High Court a

(1) Summary Jurisdiction Rules, 1915, r. 58: "When any person is authorised under any Act, whether general or local, and whether passed before or after April 1, 1915 (other than the Summary Jurisdiction Acts), to appeal to any police or stipendiary magistrate or any justice of the peace against the decision or order of any local or other authority or other person or body, the procedure shall be by way of complaint for an order, and the Summary Jurisdiction Acts shall apply to all such proceedings."

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party appeals from a decision against him by filing a notice of appeal, but it may be some time before the appeal is heard; he has no control over the latter date.

[DARLING J. Is not the effect of r. 58 of the Summary Jurisdiction Rules, 1915, to abolish the procedure of notice of appeal prescribed by s. 22, sub-s. 5, of the Act of 1910 ?]

That contention was not raised before the magistrate.

[AVORY J. An appellant is not confined to the points of law taken before the magistrate.]

Rule 58 merely defines the procedure; it does not deal with the question of time, and the time within which the notice of appeal, i.e., notice of intention to apply for a summons, must be given is still governed by s. 22, sub-s. 5, of the Act of 1910.

Simmons, in reply, referred to *City of London Corporation* v. *Wolff*. (1)

SANKEY J. In this case I have the misfortune to differ from my Lord and my brother Avory. I need hardly say that I do so with great hesitation, but, having formed a definite opinion about the case, I think I ought to adhere to it. The question arises under the London County Council (General Powers) Act, 1910, which by s. 20 provides that no person shall carry on an employment agency without a licence from the licensing authority, that is, the London County Council. By s. 22, sub-s. 5, a right of appeal is given to any person who deems himself aggrieved by the refusal of the licensing authority to grant a licence, provided that the appeal is made within fourteen days from the date of the refusal and that four days' notice of the appeal is sent to the licensing authority. The facts are as follows: [The learned judge stated the facts as set out in the case, and continued:] I think the decision of the magistrate was right. I ask myself, first, what is "the appeal," of which four days' notice is required by s. 22, sub-s. 5? I think an appeal is the transference of a case from an inferior to a higher tribunal in the hope of reversing or modifying the decision of the former. That definition is taken from the Oxford English Dictionary, and it is, in my opinion, a correct definition; and I further think that the application for the transference of the case to the higher tribunal is the appeal. There-

(1) (1916) 115 L. T. 830.

fore, where a person either applies to a Court to fix a day for the hearing of an appeal, or when he files a document with the Court giving notice of his intention to appeal, in either of those cases that is the appeal. What happens afterwards is the hearing of the appeal. I think there is a distinction to be drawn between the appeal, which is the application in one form or another, and the hearing of the appeal, which is the exercise by the Court of its jurisdiction in respect of the application. Looking at the words of s. 22, sub-s. 5, it appears to me, therefore, that the appeal in this case was made on March 24 when the appellant applied to the magistrate to reverse the decision of the licensing authority. What took place on March 30 was not the appeal, but the hearing of the appeal.

But then it is said that, although that may be the correct interpretation of s. 22, sub-s. 5, r. 58 of the Summary Jurisdiction Rules, 1915, has made a change in the procedure. It does not appear to me that that rule in any way alters the time prescribed by sub-s. 5 of s. 22. It is quite possible to read r. 58 and sub-s. 5 together without producing any difficulty or anomaly. In my opinion the words "the procedure shall be by way of complaint" in r. 58 simply mean that the appeal is begun by complaint instead of going to the magistrate to fix a day as was the former practice. Reading the rule and the sub-section together, I think that the complaint is the appeal, and as sub-s. 5 says that there must be four days' notice of the appeal there must now be four days' notice of the complaint. That notice was not given in this case, and therefore, in my opinion, the objection, technical though it may be, ought to prevail, and the appeal should be dismissed.

AVORY J. This is, as Sankey J. has said, a highly technical objection, but if it is well founded this Court ought to, and would, give effect to it. In my opinion it is not well founded. The objection is that the four days' notice in writing of the appeal required by sub-s. 5 of s. 22 of the Act of 1910 was not sent in this case to the respondents. If a notice was required, it was, in fact, given in a duplicate form, because it was given in the form of a summons which was issued on March 24 for the hearing on March 30, and it was given in the form of a notice of appeal, also served on March 24. Whatever may have been the practice under the Act of 1910, the question

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raised in this case has to be determined in the light of r. 58 of the Summary Jurisdiction Rules of 1915. [The learned judge read the rule, and continued:] I attach importance to the last words of the rule, "the Summary Jurisdiction Acts shall apply to all such proceedings." It is admitted that this rule has to be applied to this case, and, in my opinion, this alteration of the procedure substitutes the complaint, and the summons which is issued upon it, for the notice of appeal required by s. 22, sub-s. 5, of the Act of 1910, thereby impliedly repealing that provision, leaving intact the provision as to the time within which the appeal must be made, which undoubtedly was complied with in this case. Upon this point of the implied repeal I would refer to a decision of this Court in *Reg.* v. *Glamorganshire Justices*. (1) The question in that case arose in this way. The Act of 1827 for consolidating and amending the excise laws (7 & 8 Geo. 4, c. 53) required notice of appeal from a conviction under that Act to be given "at and immediately upon the giving of the judgment appealed against." By the Summary Jurisdiction Act, 1879, persons authorized to appeal from a Court of summary jurisdiction may appeal, subject to the condition of giving notice of appeal, if no time is prescribed, within seven days after the date of the decision. Then by the Summary Jurisdiction Act of 1884 a person authorized to appeal by any Act before the Summary Jurisdiction Act, 1879, from a conviction shall appeal subject to the conditions and regulations contained in the Act of 1879. A person was convicted of an offence against this excise law, and he gave notice of appeal within four days after the decision. It was argued that the notice of appeal was not in time, and after counsel had pointed out that the Excise Act required it to be given "at and immediately upon the giving of the judgment appealed against," it was contended that the Summary Jurisdiction Acts had not altered the time within which notice was to be given, and that the words of the Summary Jurisdiction Act, 1879, specifying a period of seven days, applied only if no time was prescribed; whereas in the case in question the time was prescribed by the Excise Act, which was not repealed, expressly or impliedly, by anything in the Summary Jurisdiction Acts. Lord Coleridge C.J., in giving judgment, said: "The question in this case is whether the notice of appeal was given

(1) 22 Q. B. D. 628, 630.

in time . . . . There was a code of procedure provided by 7 & 8 Geo. 4, c. 53, s. 83, and it is admitted that if the provisions of that section are still in force proper notice has not been given in the present case, for those provisions have not been followed." Then he proceeded to deal with the Summary Jurisdiction Acts, and he concluded his judgment in these words: "We must interpret the Act broadly, according to common sense, and according to the expressly declared intention of the Legislature. I cannot interpret these Acts of Parliament so as to give effect to every word, but my conclusion is that on the whole the true effect and meaning of the Acts (especially having regard to the recital in the preamble to the Act of 1884, and the express enactment contained in s. 6) is to get rid of all other procedure except that provided by the Summary Jurisdiction Acts, and that the notice which was given in accordance with the Act of 1879 was sufficient." Hawkins J. concurred in that judgment. I do not say that that case is a direct authority, but it appears to me to be analogous to the present case, and a sufficient justification for holding, as I do, that this rule, providing that for the future the procedure is to be by way of complaint and order, and that the Summary Jurisdiction Acts are to apply, has the effect of substituting the complaint and the summons for the notice of the appeal which was required under the Act of 1910. Assuming that the appeal is made, within the meaning of the Act of 1910, when the complaint is lodged, there can be no practical object in giving four days' notice to the London County Council of the application for the summons, nor in giving a duplicate notice of the date fixed for the hearing of the appeal, particularly as the statute does not require the grounds of the appeal to be given. If the case had arisen before the Summary Jurisdiction Rules of 1915, no preliminary application to the magistrate was required by the Act of 1910, although for convenience it may have been made; and upon the notice given on March 24 the parties might have attended before the magistrate on March 29 or 30 and asked him to hear the appeal; he would then have heard it or adjourned it to a convenient day and the provisions of the Act would have been complied with—that is to say, that what was done in this case would have been a compliance, in my opinion, with the Act of 1910, even if the Rules of 1915 had not altered the procedure. The words of the Act of

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1910 are "four days' notice of such appeal," and not of the intention to appeal. The effect of the respondents' contention is that it is now necessary to give four days' notice of the intention to apply for a summons. This is entirely novel in proceedings under the Summary Jurisdiction Acts, which, by the Rules of 1915, are made to apply to these proceedings. I think the magistrate had jurisdiction to hear the appeal.

DARLING J. I am of the same opinion. I only desire to say that when the procedure was as laid down in the Act of 1910 there was a very good reason for the giving of the four days' notice of the appeal, but that now there is no object in it at all; it would admittedly be useless. I think the fair and proper conclusion to arrive at is that when the procedure under the Summary Jurisdiction Acts, indicated by r. 58 of the Summary Jurisdiction Rules, 1915, was made applicable to this kind of appeal, that procedure was substituted for the old procedure, and that, although there is the limit as to the time within which the appeal is to be made (that is within fourteen days) the statute no longer has effect so far as it says that four days' notice in writing of the appeal is to be given to the licensing authority. It is not such an appeal as it was; it is an appeal of a different kind. It is an appeal originated by summons. If notice were given to the County Council that a summons was to be applied for they would have no locus standi if they appeared at the police court and asked the magistrate not to grant the summons. I agree with the reasons given by Avory J., and the appeal will, therefore, be allowed.

Appeal allowed.

Solicitors for appellant: *Ernest Simmons & Co.*
Solicitor for respondents: *E. Tanner.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1917
Nov. 6.

MOOR LINE, LIMITED *v.* LOUIS DREYFUS & CO.

[1916 M. 1190.]

Ship—Charterparty—Commission payable to Charterers—Commission 2½ per cent. on Shipment of Cargo—Demurrage at Port of Discharge.

By a charterparty a ship was to load a cargo and proceed to a named port and there deliver her cargo on being paid freight. The cargo was to be received at the port of discharge at a certain rate, in default of which demurrage was to be paid at a certain sum per day. The charterparty contained the following clause: "A commission of 2½ per cent. is due on shipment of cargo to" the charterers, "vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms":—

Held, that the charterers were not entitled to commission on demurrage at the port of discharge payable by the charterers to the shipowners.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury.

The plaintiffs, who were the owners of the steamship *Hopemoor*, sued the defendants, who were the charterers of the steamship, to recover 137*l.* balance of freight.

By the charterparty, which was headed "North American Berth Contract," and dated September 21, 1915, it was agreed that the steamer should proceed to a North American port as ordered and there load from the charterers or their agents a complete cargo of grain, and being so loaded should proceed to a safe port in the Mediterranean within certain limits as ordered on signing bills of lading, and there deliver the same on being paid freight at 11*s.* 3*d.* per quarter of 480 lbs. of heavy grain. The steamer was to be loaded according to berth terms, with customary berth despatch, and if detained longer than five days, Sundays and holidays excepted, charterers were to pay demurrage at the rate of 4*d.* per net register ton per day, provided that such detention should occur by default of charterers or their agents. The charterers' liability under the charter was to cease on cargo being shipped, but the vessel was to have a lien thereon for all freight, dead freight, demurrage or

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average. "Cash for vessel's ordinary disbursements at port of loading to be advanced by charterers, if required by master, at current rate of exchange, subject to insurance and two and a half per cent. commission. A commission of 2½ per cent. is due on shipment of cargo to Louis Dreyfus & Co., vessel lost or not lost whose agents at port of loading are to attend to ship's business on customary terms." The charterers were to pay freight in London in cash without discount, one-third when discharge commenced, one-third when half discharged, and the balance when discharge was completed. The cargo was to be received at the port of discharge at a certain rate, in default of which demurrage was to be paid by the receivers in cash without discount at the rate of 120*l.* per running day or pro rata for part thereof.

Demurrage at the port of discharge to the amount of 5480*l.* became payable by the defendants to the plaintiffs, and in paying the account for freight and demurrage due to the plaintiffs the defendants deducted from the balance due on such account the sum of 137*l.*, representing 2½ per cent. commission upon the above-mentioned sum of 5480*l.* for demurrage at the port of discharge. The plaintiffs sued to recover this amount of 137*l.*, contending that commission was payable on freight only and not on demurrage.

BAILHACHE J. The question is an extremely short one and turns upon the construction of one clause in the charterparty only: "A commission of 2½ per cent. is due on shipment of cargo to Louis Dreyfus & Co., vessel lost or not lost, whose agents at port of loading are to attend to ship's business on customary terms." It is contended on behalf of the defendants that that clause entitles them to commission, not only on the freight, but also upon payments which they have to make in respect of demurrage at the port of discharge. It is contended, on the other hand, that the clause only entitles the defendants to commission on the amount of the freight.

The history of this matter stands in this way: originally it was sometimes necessary for a shipowner to pay commission on the signing of the charterparty, and in those cases the custom was for the broker to be paid a commission of 5 per cent. on the freight. Latterly it has been the custom—I suppose now the invariable custom—to insert the broker's right to commission in the charter-

party itself. The charterparty is not, of course, a contract between the shipowner and charterer and the broker, but the broker's commission is inserted in the charterparty, and when it is so inserted no difficulty arises about payment. The commission which is payable to the broker is expressed in different phraseology in different charterparties. In many modern charterparties the brokerage is expressed to be "on freight, dead freight and demurrage." It is also commonly expressed that brokerage is due to the broker on the signing of the charterparty; and sometimes the words "ship lost or not lost" are added.

Of course a difficulty arises from saying that brokerage on freight, dead freight, and demurrage is due on the signing of the charterparty, because at that date it cannot generally be ascertained what the freight is; and it certainly cannot be known whether any dead freight or demurrage will be incurred. In a case of that sort (1) which came first before a learned arbitrator—Mr. Clifton, a gentleman of large experience in these matters—and afterwards before Scrutton J., as he then was, the question arose whether in a clause in a charterparty expressed in those words, "Commission to be on freight, dead freight and demurrage, due on the signing of the charter," the term "demurrage" covered demurrage at the port of discharge, the difficulty being that it could not by any possibility be due on the signing of the charterparty. It was equally true in that case to say that the freight could not be ascertained until the vessel was discharged, particularly when that freight was payable on the weight of the outturn, and it could not be known when the charterparty was signed whether there would be demurrage at the port of discharge. The arbitrator and Scrutton J. both held that although the commission was expressed to be payable on the signing of the charterparty that did not exclude the broker's right to have his commission on the demurrage at the port of discharge. That case does not touch the question I have to decide, and I only mention it because it has been cited to me.

It has been said by Mr. Leck, for the defendants, that as modern forms of charterparties are commonly expressed in this way, "Commission to be paid on freight, dead freight and demurrage,"

(1) *In re Tatem Steam Navigation Co. and Huni and Wormser* (July 12, 1916), not reported.

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Bailhache J.

I must take it that when a charterparty merely says "commission" it means the same as if the charterparty said in terms, "Commission on freight, dead freight and demurrage." He says that those words only express the custom which has now sprung up in this particular business of paying commission on the three items—freight, dead freight, and demurrage. I am unable to take that view. It is not a scientific argument to say that because a commission on the three items is commonly contracted for, therefore it is customary, and that when I find nothing said in the charterparty about it I must treat the charterparty as though expressed in a different form. If a custom is relied on it must be proved, not by producing various forms of contract, but by giving independent evidence of what the custom in fact is. The contracts may be in accordance with the custom, but they may not.

If I disregard other forms of charterparty, and simply apply my mind to this form of charterparty which says that "a commission of $2\frac{1}{2}$ per cent. is due on shipment of cargo," I should have no difficulty in coming to the conclusion that it only refers to commission on the freight which is payable. It is true that the freight is not definitely ascertainable until the vessel is discharged, but it is more or less ascertainable when the cargo is in fact shipped. The fact that other forms of charterparty, when they mean that commission is to be paid not only on freight but also on demurrage, say so in express terms, so far from being an argument in favour of Mr. Leck's contention, is an argument the other way.

If brokerage is to be paid on more than the freight—that is to say, on dead freight and on demurrage—either it will have to be proved that the custom has become sufficiently universal for me to take judicial notice of, or it will have to be established on the construction of the particular charterparty. The plaintiffs are right, and my judgment must be for them for the amount claimed with costs.

The defendants appealed.

Leck, K.C., and *R. A. Wright, K.C.*, for the defendants. The $2\frac{1}{2}$ per cent. commission is payable on all benefits which the shipowners receive under the charterparty. The clause entitling the defendants to commission is general in its terms, and there

is no ground for limiting it to commission on freight. The defendants here are the charterers, and the commission is payable on all sums which the shipowners receive under the charterparty. Demurrage at the port of discharge is payable under the charterparty. In some forms of charterparty, for instance in the grain trade, commission is expressly made payable on freight, dead freight, and demurrage. Those words are only this charterparty writ large. The words of the present charterparty cover all those payments and the commission is payable on the demurrage. [*Hill* v. *Kitching* (1) was referred to.]

MacKinnon, K.C., and *Raeburn*, for the plaintiffs, were not called upon.

PICKFORD L.J. In my opinion this appeal fails. The question depends entirely upon the construction of a very few words in a charterparty. Bailhache J. has expressed so completely the opinion which I have formed upon the meaning of the words that I see no necessity for repeating what he has said. I will only add with respect to the last paragraph in his judgment that I accept and adopt it.

BANKES L.J. I agree. It seems to me that the view taken by Bailhache J. of the clause in the charterparty is correct. As I understand it, his view is that when one finds a clause providing for the payment of commission, without any words extending or limiting it, the inference is, in the absence of evidence of custom, that the commission is upon the sum payable on the performance of the contract, and not upon any sums which become payable as compensation for its non-performance. I agree with that view.

SARGANT J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs : *Botterell & Roche.*
Solicitors for defendants : *William A. Crump & Son.*

(1) (1846) 3 C. B. 299.

W. F. B.

C. A.
1917
Nov. 12.

[IN THE COURT OF APPEAL.]

CLEMENTS *v.* COUNTY OF DEVON INSURANCE COMMITTEE.

[1917. C. 81.]

EXETER DISTRICT REGISTRY.

Insurance (National Health)—Panel Doctor—Agreement with Insurance Committee—Question arising under Agreement—Reference to Insurance Commissioners—"Submission" to Arbitration—Staying Proceedings in Action—National Health Insurance (Medical Benefit) Regulations (England), 1913, *reg.* 51—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 27.

By an agreement between a medical practitioner on the panel and the insurance committee of a county, which came into force on January 12, 1914, the practitioner agreed to give medical treatment to insured persons, and by clause 1 the National Health Insurance (Medical Benefit) Regulations (England), 1913, were incorporated. By clause 14, "any dispute or question arising between the committee and the practitioner . . . . relating to the construction of this agreement or the rights and liabilities of the committee or the practitioner . . . . hereunder shall be referred to the Commissioners." By reg. 51 of the regulations, "Where under the provisions of these regulations or of any agreement made between the committee and a practitioner on the panel . . . . any question arising between the committee and the practitioner . . . . is referred, or any appeal from a decision of the committee is made, to the Commissioners, the Commissioners shall determine such question or appeal in such manner as they think fit, and if in the opinion of the Commissioners a hearing is required they may authorise any two or more of the Commissioners to hear and determine such question or appeal, and any decision of the Commissioners or any of them made under this article shall be final and conclusive."

A dispute having arisen under the agreement, the practitioner brought an action against the committee in respect thereof, and the committee applied under s. 4 of the Arbitration Act, 1889, to stay the action. The judge in chambers held that there was no "submission" to arbitration as defined by s. 27 of the Arbitration Act, 1889, and upon this ground refused to stay the action. No question as to the exercise of discretion arose:—

Held, that the appeal must be allowed and the action stayed. By Pickford L.J. and Sargant J., upon the ground that there was a "submission" to arbitration within s. 27 of the Arbitration Act, 1889; by Bankes L.J. (doubting whether there was a "submis-

sion" to arbitration, but not differing upon this point), upon the ground that under reg. 51 a special tribunal was constituted with special powers for determining disputes between practitioners and the committee.

APPEAL from an order made by Rowlatt J. in chambers.

By an agreement (on a printed form and headed "National Insurance Acts, 1911 to 1913") dated December 9, 1913 (which came into force on January 12, 1914), and made between the plaintiff, who was a medical practitioner on the panel in the defendants' district, and the defendants, the plaintiff agreed to give medical treatment to all persons who were for the time being entitled to obtain treatment from him. By clause 1, "The National Insurance Acts, 1911 to 1913, and the National Health Insurance (Medical Benefit) Regulations (England), 1913 (hereinafter called 'the Regulations') or other regulations for the administration of medical benefit in force for the time being in the area of the committee are incorporated in and form part of this agreement." By clause 14, "Any dispute or question" (with certain exceptions not material to the present case) "arising between the committee and the practitioner or his legal personal representative relating to the construction of this agreement or the rights and liabilities of the committee or the practitioner or his legal personal representative hereunder shall be referred to the Commissioners."

By reg. 2 of the National Health Insurance (Medical Benefit) Regulations (England), 1913 (1) (which came into operation on January 12, 1914), "The Commissioners" means the Insurance Commissioners, and "committee" means the insurance committee for any county. By reg. 51, "Where under the provisions of these regulations or of any agreement made between the committee and a practitioner on the panel or person supplying drugs or appliances any question arising between the committee and the practitioner or person supplying drugs or appliances or his legal personal representative is referred, or any appeal from a decision of the committee is made, to the Commissioners, the Commissioners shall determine such question or appeal in such manner as they think fit, and, if in the opinion of the Commissioners a hearing is required, they may authorise any two or more of the Commissioners to hear and

(1) See Statutory Rules and Orders, 1914, vol. 2, p. 201.

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determine such question or appeal, and any decision of the Commissioners or any of them made under this article shall be final and conclusive."

The plaintiff brought an action to recover such proportion of the capitation fees as he might rightly claim under reg. 35 (1.) of the regulations, which fees he alleged had been wrongly paid to another medical practitioner by the defendants in respect of certain insured persons. Upon the application of the defendants under s. 4 of the Arbitration Act, 1889, the district registrar stayed the action. Rowlatt J. discharged the order. The learned judge made the following note: "In this case the appellant appeared in person. I set aside order because it appeared by s. 51 of the regulations that the Commissioners do not act as arbitrators, but may depute others to decide for them. This being so, I thought the agreement relied on was not a 'submission' within the Arbitration Act. Nor has it statutory force in its operation of excluding the jurisdiction of the Court as I cannot find any authority to the Commissioners to do that."

The defendants appealed.

A. Neilson, for the defendants. Clause 14 of the agreement is a "submission" to arbitration within the meaning of s. 27 of the Arbitration Act, 1889, in accordance with reg. 51 of the regulations which are incorporated in the agreement. These regulations have statutory force under s. 65 of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55). Clause 14 of the agreement comes within the very words of s. 27. The question is referred to the Commissioners, and the plaintiff has agreed that they shall hear the dispute as provided by reg. 51. The words "if in the opinion of the Commissioners a hearing is required" mean that, if the Commissioners think an oral hearing is required, they may authorize two or more Commissioners—not, as the learned judge thought, two or more persons who are not Commissioners—to hear and determine the question. The learned judge did not purport to exercise any discretion as to staying the action; he held that he had no jurisdiction to do so. In that he was wrong. [*Bristol Corporation* v. *Aird & Co.* (1) was referred to.]

(1) [1913] A. C. 241, 247.

Plaintiff in person. The Court has no jurisdiction to stay the action unless there is a valid agreement to submit the dispute to arbitration. There is here no valid "submission" to arbitration. The regulations being incorporated in the agreement, the procedure set out in reg. 51 is incorporated. The provisions of Sched. I. to the Arbitration Act, 1889, are implied in submissions, unless a contrary intention is expressed. In an arbitration there should be a judicial inquiry worked out in a judicial manner: per Lord Esher M.R. in *In re Carus-Wilson and Greene.*(1) Reg. 51 gives power to the Commissioners to determine the question in such manner as they think fit, and the regulation goes on to provide in effect that they may proceed to determine the question without a hearing. They may also, if they have a hearing, delegate their jurisdiction to others. Those provisions are inconsistent with the provisions of the Arbitration Act, 1889, and the plaintiff ought not to be forced to submit to them. It is not a "submission" to arbitration within the Act. Further, reg. 51 is too vague and ambiguous to justify the Court in staying the action. [*Douglas* v. *Baynes* (2) was referred to.]

No reply was called for.

PICKFORD L.J. I think that this appeal should be allowed. An agreement was made between the plaintiff, a medical practitioner, and the insurance committee of the county of Devon, and clause 1 provides that the National Insurance Acts and the National Health Insurance (Medical Benefit) Regulations (England), 1913, or other regulations for the time being in force, are incorporated in and form part of the agreement. Therefore the regulations must be taken as being written out in full in this agreement as part of it. The agreement and the regulations came into force on the same day, namely, January 12, 1914. Clause 14 is the only other clause of the agreement to which it is necessary to refer. [The Lord Justice read the clause.] The Commissioners to whom the dispute or question is to be referred are the Insurance Commissioners, and we are told that they are five or seven in number.

Reg. 51 of the regulations is as follows: [The Lord Justice read the regulation.] It is perhaps not obvious at first sight what is the

(1) (1886) 18 Q. B. D. 7, 9. (2) [1908] A. C. 477.

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Pickford L.J.

meaning of the words "If in the opinion of the Commissioners a hearing is required." It is suggested that they mean that the Commissioners may decide without a hearing in any form at all. I do not think that is the meaning. The regulation is not, if I may say so, very clearly drawn, but I think it means that, if the Commissioners think that a hearing in the sense of an oral hearing—that is to say, a hearing with witnesses—is required, two or more Commissioners may hear the matter instead of the whole body. The learned judge seems to have taken that, as I read his note, as meaning that the Commissioners may depute their powers to some persons who are not members of their own body. That is not the meaning. It is a power to appoint two or more of their own body in case a hearing in the sense I have stated is, in the opinion of the Commissioners, required.

The plaintiff brought an action against the County of Devon Insurance Committee for the purpose of having a question arising between him and the committee determined, and the committee applied to stay that action under s. 4 of the Arbitration Act on the ground that there was a "submission" to arbitration within the meaning of that Act. The provision in clause 14 of the agreement is that any such dispute or question shall be referred to the Commissioners. Now "referred" is an apt word which is used for referring to arbitration. It is true that the word "arbitration" is not used, but I think this must be taken as a reference to the Commissioners as arbitrators. That being so, the Commissioners mean the Commissioners or two or more of them acting under the procedure mentioned in reg. 51. The plaintiff has agreed that that regulation shall apply to his agreement, and I do not think it is open to him now to say that, although he agreed to the procedure mentioned in reg. 51, it is a departure from the procedure which is provided unless otherwise specified in the Arbitration Act, 1889, and that therefore it is a procedure to which he ought not to be subjected. I cannot take much notice of the argument that from his position he did not understand what he was agreeing to. At any rate, that point can only be taken in an action to set aside the agreement.

In my opinion this was a reference to the Commissioners as arbitrators to decide according to the procedure mentioned in reg. 51,

the plaintiff having agreed that those regulations should be part of his agreement. For these reasons I think that the view of the learned judge is not correct. If he had said as a matter of discretion that the dispute ought not to be referred and that the action should be allowed to proceed, I should have hesitated long before interfering with the exercise of his discretion. But he did not. He said there was no "submission." I cannot take that view. I think there was a submission, and the defendants are entitled to the order to stay.

BANKES L.J. I agree in thinking that the view, if I understand it rightly, of the learned judge as to the meaning of reg. 51 is not correct. I understand his note to mean that he interpreted the regulation as giving the Commissioners power to direct some persons other than members of their own body to decide the dispute. I do not think that is the meaning of the regulation. I have, however, very considerable doubt whether clause 14 of the agreement coupled with reg. 51 is, strictly speaking, a submission to arbitration. I do not differ from the other members of the Court upon this point, and it is not necessary to come to a decision upon it from my point of view, because, whether the true view is that there is a submission to arbitration, or whether the true view is that under reg. 51, which has statutory effect, a special tribunal is constituted with special powers for deciding disputes between practitioners and the committee, the result is the same. It is not now necessary to decide the point, but I think that the language of reg. 51, partly from the fact that it omits any reference to the expression "arbitration" and partly from the fact that it gives the Commissioners power to determine the question or appeal in such manner as they think fit, coupled with the provision as to the hearing, indicates that the Commissioners have power, if they choose to exercise it, of saying that any particular dispute is one which can better be, and, if they so decide, shall be, decided upon documentary evidence without hearing witnesses. This is not arbitration in the ordinary sense of the word. If the true view is that there is a special tribunal set up by Parliament for the purpose of dealing with these disputes, and to that special tribunal the plaintiff has by clause 14 of the agreement to go, then, as was pointed out by Lord Haldane in

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Bankes L.J.

Local Government Board v. *Arlidge* (1), that does not absolve the tribunal from dealing with the matter judicially, although it may absolve them from dealing with it according to the procedure which is usually adopted in the case of an arbitration in the ordinary sense.

I agree, in the result, that the appeal should be allowed, although, if it were necessary to come to any definite decision upon the point, I feel great doubt whether there is, strictly speaking, a submission to arbitration in this case.

SARGANT J. I agree that this appeal should be allowed, and I prefer to put my decision upon the ground taken by Pickford L.J.

It seems to me that for the purposes of this case the regulations that have been made, and especially reg. 51, derive their force, not from being statutory regulations made under the provisions of the Act, but from the express agreement made between the parties. The whole force here seems to me to be given to the regulations by their being introduced into the agreement between the parties by way of incorporation.

The plaintiff has said a good deal about equitable relief. It seems to me that he has deliberately abstained from asking any equitable relief. He has in no way sought to make a case for the rectification of the agreement; he has come here on the footing of the agreement; and, that being so, it seems to me that all we have to do is to construe its terms.

Construing those terms, I think that clause 14 of the agreement in stating that any dispute or question shall be referred to the Commissioners is, especially when the terms of reg. 51 of the regulations are looked at, a clear and definite submission to arbitration within s. 27 of the Arbitration Act, 1889. That being so, the Court is bound prima facie, and apart from good reason to the contrary, to give effect to the express agreement between the parties by staying the proceedings in the action. It seems to me that this view is the more satisfactory one, because it does not treat the Commissioners as having any special privileges, but only treats them as the tribunal under a special form of arbitration to whom the parties have agreed to refer their differences. No doubt the

(1) [1915] A. C. 120, 132.

Commissioners, in proceeding under that reference, will observe all proper formalities such as would be observed by an ordinary Court of arbitration.

Appeal allowed.

Solicitors for defendants: *Gibbs, White & Co., for C. R. M. Clapp, Exeter.*

W. F. B.

JOHNSON *v.* SARGANT & SONS.

[1917 J. 878.]

Statutory Order—Date when it comes into Operation—Beans, Peas and Pulse (Requisition) Order, 1917.

An Order made by the Food Controller under the Defence of the Realm Regulations was dated May 16, 1917, but was not known to the parties to the action or to the public generally till May 17:—

Held, that the Order came into operation only when it became known, namely, on May 17.

ACTION tried by Bailhache J.

On April 18, 1917, the plaintiff agreed to buy, on c.i.f. terms, from the defendants 1000 bags of Brazilian beans (which were suitable for human food), shipped in the *Manchuria*, sailing on May 1, 1917, for London, and forming part of a cargo of 3000 bags being imported by a firm named Methuen & Sons. That firm sold 2000 bags to a firm named Wimble, Sons & Co., who sold them to the defendants, who resold 1000 bags to the plaintiff. The ship arrived in London on May 13, 1917, and on May 16 the defendants gave, and the plaintiff accepted, a delivery order for the beans, and the plaintiff paid the invoice price. The beans were then discharged into a warehouse. On the same date (May 16) an Order, called the Beans, Peas and Pulse (Requisition) Order, 1917, was made by the Food Controller under Regulation 2 F of the Defence of the Realm Regulations. The Order contained the following provisions:—

"1. All persons owning or having power to sell or dispose of any beans, peas or pulse suitable for human food which have arrived in the United Kingdom or which shall hereafter arrive (except

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beans, peas and pulse arrived which have been sold by the original consignees and paid for by the purchasers) shall place and hold such beans, peas and pulse at the disposal of the Food Controller.

"2. The beans, peas and pulse are taken over by the Food Controller from the original consignees and the Food Controller will subsequently communicate to them the prices which he will be prepared to pay for the same.

"3. Except as otherwise determined by the Food Controller in any particular case all contracts made by the original consignees or any persons claiming under them for the sale of any beans, peas and pulse taken over under this Order are cancelled, and sellers and/or buyers are to stand released from all liability as to brokerage."

The above Order was first known to the various parties and by the public generally by an announcement in the newspapers on the morning of May 17.

The plaintiff said that as none of the purchasers from Methuen & Sons had paid for the beans before May 16 the beans did not come within the exception in paragraph 1 of the Order, and that by virtue of that Order they were taken over by the Food Controller, and all contracts in relation thereto were cancelled. The plaintiff accordingly asked for a declaration that his contract was cancelled, and claimed repayment of the amount paid by him as on a total failure of consideration, or as money had and received to his use.

MacKinnon, K.C., and *Barrington-Ward*, for the plaintiff. By analogy to the rule that a statute takes effect from the first moment of the day on which it is passed, unless another day is expressly named, in which case it comes into operation immediately on the expiration of the previous day, the Order of the Food Controller, being dated May 16, came into operation immediately after midnight on May 15. It follows, therefore, that as the beans in question were not paid for before May 16 the contract became cancelled and the plaintiff is entitled to be repaid the amount paid by him. [Maxwell's Interpretation of Statutes, 5th ed., p. 681, was referred to.]

R. A. Wright, K.C., and *Le Quesne*, for the defendant. The Order became effective only when it became known to the parties and the public, namely, on May 17. The suggested analogy between a

statute and an Order such as this is not sound. A publicity is given to a statute during its passage through Parliament which is entirely absent in the case of an Order.

BAILHACHE J. In this case the question is whether when the beans were paid for the vendors had the power to dispose of them or whether they were precluded from doing so by virtue of the Order of the Food Controller, which, I shall assume, is intra vires. Par. 1 says: "All persons owning or having power to sell or dispose of any beans . . . . which have arrived in the United Kingdom"—that must mean arrived in the United Kingdom when the Order takes effect—"or which shall hereafter arrive (except beans . . . . arrived which have been sold by the original consignees and paid for by the purchasers)"—that must mean sold by the original consignee and paid for by the purchaser before the Order takes effect—"shall place and hold such beans . . . . at the disposal of the Food Controller." The question is whether these beans come within the exception or not. The Order is dated May 16, 1917; the goods were paid for by the three people concerned, within banking hours, on May 16, 1917, although at what precise time on that day is not known. Nor do we know at what time on May 16 the Food Controller signed the Order. This, however, we do know, that the effect of the Order was published on May 17, and in all probability was well known to all persons interested in the trade on that date. I have no reason to suppose that any one in the trade knew about it on May 16. Being dated May 16, it is said for the plaintiff that it took effect from the earliest moment of that day by analogy to the rule with regard to the construction of statutes. While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this Order came into operation before it was known, and, as I have said, it was not known until the morning of May 17. I am therefore

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Bailhache J.

obliged to hold that this transaction comes within the exception in par. 1 of the Order as relating to "beans . . . . arrived which have been sold by the original consignees and paid for by the purchasers." The result is that the action fails and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiff: *Evelyn Jones & Co.*
Solicitor for defendants: *J. Alexander Aldred.*

J. S. H.

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Nov. 15.

GONSKY *v.* DURRELL.

Distress—Seizure of privileged Goods—Value of other privileged Goods left after Distraint—Onus of Proof—Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

In an action for wrongfully distraining a tool of the plaintiff's trade in contravention of s. 4 of the Law of Distress Amendment Act, 1888, the onus lies upon the plaintiff to prove that 5*l.* worth of wearing apparel, bedding, and tools of trade was not left by the distrainor upon the premises as required by s. 147 of the County Courts Act, 1888. The common law protection, which the statute does not touch, cannot be relied upon in an action framed only on the statute.

APPEAL from the Whitechapel County Court.

The plaintiff, a tailor's presser, was tenant to the defendant of a house in the Mile End Road at a weekly rental of 13*s.* On November 21, 1916, the rent being in arrear to the amount of 4*l.* 13*s.*, the defendant caused a distress to be put in. Among the goods seized by the bailiff was a sewing-machine. The plaintiff then brought this action claiming that the sewing-machine had been wrongfully distrained "in contravention of s. 4 of the Law of Distress Amendment Act, 1888." (1) At the trial the county court judge at the

(1) By s. 4 of the Law of Distress Amendment Act, 1888, "The following goods and chattels shall be exempt from distress for rent; namely any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the

close of the plaintiff's case entered judgment for the defendant upon the ground that the plaintiff had failed to give evidence that the defendant did not leave 5*l.* of bed, bedding, or wearing apparel upon the premises after levying the distress. The plaintiff appealed.

H. S. Q. Henriques, for the plaintiff. The meaning of s. 147 of the County Courts Act, 1888, is that 5*l.* worth in the aggregate of goods of the protected classes therein mentioned must be left on the premises after the distress: *Boyd* v. *Bilham*. (1) There is at present no case in which it has been decided whether in an action for wrongful distress under the Act of 1888 the onus of proving the value of the goods left lies on the plaintiff or the defendant, but it is contended that it lies on the defendant. It is not only under that Act that the tools of a man's trade are protected from distress. They are also so protected at common law sub modo, that is, if there be sufficient other distress of an unprivileged kind upon the premises. But it was held in *Nargett* v. *Nias* (2) that an action at common law for distraining a tool of trade while there were other goods on the premises which might have been taken was properly framed in trespass, which shows that the distress of a tool of trade was prima facie wrongful, and that the absence of sufficient other distress was matter of justification for the defendant to set up. Lord Campbell, in delivering the judgment of the Court, there said that it was "not necessary for the plaintiff in his declaration to allege that there were other goods of sufficient value which might have been distrained; but the defendant must shew in his answer when he justifies that no other sufficient distress could be found." But if that is the case with the common law limitation of the protection

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County Courts Act, 1846, or any enactment amending or substituted for the same."

By s. 147 of the County Courts Act, 1888 (which is substituted for s. 96 of the Act of 1846), "Every bailiff or officer executing any process of execution issuing out of the Court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected from such seizure)."

(1) [1909] 1 K. B. 14.

(2) (1859) 1 E. & E. 439.

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afforded to the tools of a man's trade, it must equally be so with the statutory limitation—that is to say, the necessity of leaving 5*l.* worth of privileged goods on the premises after the distress.

[DARLING J. referred to *Dawson* v. *Alford* (1), the report of which is as follows: "Action of trespass was brought upon the statute (53 Hen. III. st. 4) that no man be distrained by his beasts of the plough &c., so long as another reasonable distress may be made upon him by &c. And the plaintiff did not shew in the count that any other reasonable distress could be made, but generally according to the form of the writ, sc. against the form of the statute aforesaid. And the defendant pleaded not guilty; and it was found against him: and in arrest of judgment, he shewed this default above, sed non allocatur; but this shall come from the defendant when he justifies for rent service, sc. that no other reasonable distress could be found."]

That is the case on which Lord Campbell C.J. relied in *Nargett* v. *Nias* (2) as supporting his decision, and is directly in the plaintiff's favour.

But even if the onus is in general upon the plaintiff, having regard to the facts of this particular case it becomes immaterial to consider whether he discharged it. For the defendant is in a dilemma; either there was 5*l.* worth of bedding, &c., left on the premises or there was not; if there was not, the distress was bad under the statute; if there was, then, as the rent distrained for was only 4*l.* 13*s.*, and as bedding and wearing apparel are not privileged at common law, there was sufficient other distress upon the premises and the distress was bad at common law. The statute was intended to extend the classes of protected articles, not to cut them down; it does not repeal the common law protection. There is now a double privilege attaching to the tools of a man's trade, one under the common law and one under the statute, and a distress to be valid must satisfy both.

G. W. H. Jones, for the defendant. There are two answers to the suggested dilemma. The privilege attaching to tools of trade is confined to that specified in the statute; the common law protection, so far as it is inconsistent with that given by the statute, is repealed. It cannot be that if there be 20*l.* worth of bedding and

(1) (1572) Dyer, 312a. (2) 1 E. & E. 439.

wearing apparel on the premises and a distress is put in for 2*l.* of rent the landlord cannot seize a tool of the tenant's trade. That would be in the very teeth of the section which says that the bailiff "may . . . . seize and take *any of the goods and chattels of such person* (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected)." Secondly, assuming that the common law protection of tools of trade still continues in force, the other sufficient distress, the existence of which negatives that protection, means sufficient to cover the costs of levy and possession as well as the rent distrained for, and here, though the rent in arrear was under 5*l.*, the costs of levy, 3*s.*, and man in possession, 4*s.* 6*d.*, brought the total amount distrained for to 5*l.* 0*s.* 6*d.*, so that the dilemma does not arise. Further, the plaintiff is not entitled to rely on the distress being in breach of the common law, for in his particulars he limits his claim to its being "in contravention of s. 4 of the Law of Distress Amendment Act, 1888." Under that Act the onus, wherever it lay at common law, now lies on the plaintiff, who must prove all the facts necessary to show that the distress contravened it, including the fact that 5*l.* of bedding and wearing apparel was not left. The case of *Dawson* v. *Alford* (1) is distinguishable on the ground that the statute there contained a prohibition, "that no man be distrained," whereas here the statute confers a privilege on the distrainor, "may seize any of the goods of such person excepting," &c. In the former case, the seizure of a tool of trade may have been prima facie wrongful, but in the latter it is prima facie lawful.

Henriques in reply.

DARLING J. In this case the plaintiff sued the defendant for damages for wrongful distress, his particulars of claim alleging that "On or about the 22nd day of November, 1916, the defendant wrongfully distrained on the plaintiff's goods at 470, Mile End Road, Stepney, by distraining on a Singer sewing-machine in contravention of s. 4 of the Law of Distress Amendment Act, 1888." That section provides that any chattels of the tenant or his family which would be protected from seizure in execution under the County Courts Act

(1) Dyer, 312a.

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Darling J.

shall be exempt from distress for rent; and s. 147 of the County Courts Act of the same year provides: [He read the section.] The question is whether in an action for wrongful distress under that section it is for the plaintiff or for the defendant to prove the value of the wearing apparel, bedding, and implements of trade left upon the premises after the distress. In my opinion it is for the plaintiff. A person who desires to sue on that section must show that it has been contravened, and therefore in order to start the action he must show that 5*l.* worth of the privileged classes of goods was not left. Here the plaintiff failed to give any evidence as to the value of the goods left, and in those circumstances I think the county court judge was quite right in saying that there was no evidence before him to support the plaintiff's claim. The plaintiff, however, contended that, even if the onus is upon him under the statute, in this case it is immaterial whether it is or not, for the distress must be bad either under the statute or at common law. But the plaintiff is not entitled to set up that the distress was bad at common law, for he based his claim upon a violation of this particular section, and cannot now travel outside his particulars. In holding that the plaintiff cannot succeed in an action so framed we must not be understood as throwing any doubt upon the plaintiff's contention that the statute does not take away the common law protection of implements of trade. It seems to me that the plaintiff may have a good cause of action at common law if there were sufficient other goods on the premises on which to levy, for in that case the defendant would have no right to distrain this sewing-machine. This judgment leaves it open to the plaintiff still to sue at common law, and in such an action it seems that the burden of proving the value of the goods left would be upon the defendant.

AVORY and SANKEY JJ. concurred.

Appeal dismissed.

Solicitors for plaintiff: *G. Vandamm & Co.*
Solicitors for defendant: *Forbes & Son.*

J. F. C.

DAVIS, Appellant *v.* CURRY, Respondent.

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Oct. 25.

Criminal Law—Vagrancy—Pretending to tell Fortunes—Intent to deceive—Evidence of Bona Fides—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By s. 4 of the Vagrancy Act, 1824, "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects" shall be deemed a rogue and vagabond and be liable to penalties:—

Held by Darling and Sankey JJ. (Avory J. dissenting), that to make pretending or professing to tell fortunes an offence an intention to deceive is necessary.

A defendant tried before a magistrate on a charge of pretending to tell fortunes offered evidence to show her honest belief in the possession of some power which enabled her by holding an object to tell the thoughts of the person to whom it belonged. The magistrate, being of opinion that pretending to tell fortunes imported an intention to deceive, held that a belief in the possession of the powers claimed was irrelevant. He accordingly dealt with the case on the assumption of such a belief, and in the result convicted the defendant:—

Held, that the case must be remitted to the magistrate that he might hear and consider the evidence offered.

Reg. v. *Entwistle* [1899] 1 Q. B. 846 considered.

Case stated by a metropolitan magistrate.

The appellant was charged with pretending to tell fortunes at 93, Regent Street on April 30, 1917, to deceive and impose upon one Stella Gardner, contrary to s. 4 of the Vagrancy Act, 1824 (1), and with similar offences at the same place on May 3 with regard to two other persons.

The magistrate found all three charges proved, and convicted the appellant upon two of the charges, but stated for the opinion of the Court a case in which the following facts appeared.

(1) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 4: "Every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . . . shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him . . . .) to the house of correction, there to be kept to hard labour," &c.

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6. Mary Davis, the appellant, rented the second and third floors of No. 93, Regent Street in the county of London, and carried on a business which she described as that of a "Spiritualistic Medium and Clairvoyante," and had done so for seven years preceding the hearing of the case. On the second floor door of the above address was painted "Mary Davis, Clairvoyante. Sittings 11—5."

7. On May 3, 1917, Blanche Daisley, a married woman, obtained an interview with the appellant, giving as her name that of Mrs. Fitzhughes. This witness said: "I have a brother in the Flying Corps. Can you tell me if he is safe and well and will come through?" In fact the witness had no brother in the Flying Corps. The appellant then closed her eyes and after remaining silent for some time said: "Ah, yes; I see him! Ah! But what is this? Something has happened! He is still." Then she ejaculated: "Ah! how brave; how wonderful! . . . . I am afraid I can give you no hope that he will come through! But his spirit still lives. I see two spirits: you have lost two near and dear to you." She then paused, and, looking steadily at the witness, added: "Brothers."

The appellant then requested the witness to hand her something to which she (the witness) attached great value, and the witness handed her a ring. This ring the appellant placed against her own forehead and stated that she saw two spirits who were guarding the brother of the witness alleged to be in the Flying Corps, adding: "I see two more spirits who are looking at me—mother and father." Then, pressing the ring to her forehead again, the appellant ejaculated or soliloquized: "Ah! magnetism; how you draw people!" Then (to the witness): "Why did I see your husband? He is older than you and you do not love him as a wife should." She then (in the words of the witness) "rambled about twin souls and pure spirits and a great deal of that sort of thing." At the close of the interview the witness paid the fee of 10*s.* 6*d.*, which was the amount asked by the appellant.

8. On April 30, 1917, a witness named Stella Gardner, an unmarried woman, living with her mother in Maida Vale, went by appointment to the appellant's premises. Miss Gardner told the appellant that she had been married a few months ago and had been in the habit of hearing every week from her husband, who was in the Essex

Regiment, but that, not having heard for the past three weeks, she had become anxious. The appellant asked if the witness had been to the War Office, and, hearing that she had not, asked for something which belonged to the witness's supposed husband. The witness handed her a small gold chain. This the appellant held in her hand for some time with her eyes shut and then said: "Who is Ned or Ted?" The witness replied: "My husband's brother, who died nine years ago." The appellant said: "That is the one who is going to help us. What is your husband's name?" The witness replied: "Charles." The appellant then said: "I can see him—full of life—rushing on with several others. He's not exactly good-looking, but has a pleasing face. He falls amongst others." The witness said: "Is he wounded?" The appellant replied: "I cannot tell, but he is in bed. I cannot tell where, but it is a pretty place with trees and water; and you will be with him there soon." The appellant told the witness that her fee for this interview was 10*s.* 6*d.*, and this was paid.

9. Further evidence was given by Bertha Brondel, a married woman, who visited the appellant's premises at 3.30 P.M. on May 3, 1917, and the material part of her evidence (which the magistrate accepted in full) was as follows:—"The" appellant "asked me 'What do you want?' I said: 'I want to ask you for advice.' She said: 'What kind of advice?' I said: 'I have a child that is ill.' She said: 'Have you any recommendation?' I said: 'I have a friend at Kingston who has heard you lecture there.' She said: 'What does baby suffer from?' I said: 'Heart disease.' She asked: 'How old?' I said: 'Two years. The doctors give me very little hope.' She said: 'Can you come again to-morrow, when I shall be alone?' An appointment was made for 12.30 P.M. the next day, which I kept. The" appellant "asked me to bring something which had been worn by my child, and I took a small sock. She said: 'Have you brought anything of baby's?' I produced the sock. I said: 'I was told your fee is half a guinea.' She said: 'It really is a guinea, but if you can't afford it I'll charge half a guinea.' She wrapped the sock (which was not really my own child's sock) round her right hand and placed her left hand on it and sat back with her eyes closed. After a time she said: 'I see your baby quite clearly; he has big, wonderful eyes. His heart is not badly

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diseased. I think he can be cured. I think he has the flaw on your husband's side. By spiritualism an hereditary flaw can be shown up as clearly as the gramophone needle reproduces the record. I can see your husband clearly ; he is a big-built man.' My husband is not in fact a large man, but rather slight. She then asked me if I would sit down at 12 o'clock every day and place my right hand over my baby's heart with my left hand on his back, ' At which time,' she said, ' I will throw out my spirit to ease yours and cure the child, and at the end of a fortnight your baby will be quite healed.' I then showed her a glove which I said my child had had much longer than the sock (it was not in fact my child's glove at all). The " appellant " said she would hold the glove in her hand when she was sending her spirit to meet mine in order to magnetize it. She then asked for my address, saying she would send me a piece of blotting paper which she would magnetize, and it would eat up the disease. The only child I have is a boy who is four and a half years old and who was and is quite strong and healthy."

10. The appellant was then sworn and gave evidence on her own behalf. She stated that she was a preacher of the spiritualistic religion, an authoress and a medium, and that she obtained her living by those three means. When asked what she claimed to be able to do in return for the fee of 10*s.* 6*d.* her words were : " All my life I have been possessed with supernormal qualities, and by holding an article I can see the creative thought of the person to whom it belongs if they are strong enough to create a picture that registers itself in some cosmic ether." The appellant then accounted for the vision which she described to Mrs. Daisley by saying that it was the creation of Mrs. Daisley's own mind impressed on hers (the appellant's). With regard to Miss Gardner she said : " A vision was given to me of a picture by her mind. I don't remember anything." And with regard to the baby of Mrs. Brondel she said she only endeavoured to give comfort and advice in return for the 10*s.* 6*d.* fee.

11. After the appellant had given evidence in her own behalf evidence was offered by her counsel of various persons who had had interviews with her on other occasions, and it was stated that this evidence was tendered to show that the appellant was a bona fide person who honestly believed that she possessed the powers which she described in her evidence, and that such evidence would be

relevant to the question whether she had an intention to deceive by her acts above described.

12. The magistrate was of opinion that the question of bona fides, in the sense that the appellant herself believed or had persuaded herself that she possessed what she called supranormal power, was irrelevant to the issue, because the act of pretending or professing to tell fortunes, especially when done for gain, is prohibited by the statute, which imports that deception is practised thereby irrespectively of the actual frame of mind of the person so pretending or professing or any special evidence of dishonesty. He therefore agreed to deal with the case on the assumption that the appellant might have believed or have honestly persuaded herself that she had such power as she professed in her evidence; although he found that (as appeared from the evidence) her so-called visions had no relation to any real fact or conditions and were of no value in return for the money paid to her.

13. The magistrate therefore convicted the appellant upon two of the charges preferred against her as above mentioned although he found all three charges proved.

14. On the part of the appellant it was contended (*a*) that the magistrate had erroneously rejected the evidence mentioned in paragraph 11 hereof and that, if the appellant were bona fide in believing herself in the possession of supranormal power, there was no evidence of an intention to deceive within the meaning of the Vagrancy Act, 1824, without which there could be no offence.

The question for the opinion of the Court is whether upon the above statement of facts the magistrate came to a correct determination in point of law, and, if not, what should be done in the premises.

Disturnal, K.C., and *G. H. Head* (*Cartwright Sharp* with them), for the appellant.

Travers Humphreys, for the respondent.

SANKEY J. In my opinion the words "to deceive and impose upon any of His Majesty's subjects" refer to all the incidents preceding, and an intention to deceive and impose on a person is one of the ingredients of the offence. I should have come to that con-

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clusion unassisted, but the point was decided in *Reg.* v. *Entwistle.* (1) The defendant in that case was convicted on an information which alleged that she did unlawfully pretend to tell fortunes. The justices were satisfied on the evidence that there was an intention to deceive. It was held that in order to justify the conviction there must be an intent to deceive, but that the intent was implied in the words "pretending or professing," and therefore the intent need not be specifically alleged, and that the conviction was good. Darling J. in giving judgment said (2): "I do not intend to hold that it is not necessary there should be an intent to deceive and impose upon." In other words, there must be an intention to deceive or impose upon before there can be a conviction. Channell J. said (3): "If there is not deceit, there is not any pretending or professing." The case deals, no doubt, with the form of the conviction, but it decides this question as well. One other case I wish to refer to—*Penny* v. *Hanson* (4), which was cited in *Reg.* v. *Entwistle.* (1) The report of that case in the *Law Reports* is perfectly accurate, but I read from the report in the *Law Times*, where the judgment is set out in greater detail. Denman J. there said: "This is an instance in which the doctrine res ipsa loquitur applies. It is nonsense to suppose that in these days of advanced knowledge the appellant really did believe he had the power to predict a man's future by knowing at what hour he was born, and the position of the stars at the particular moment of his birth. No person who was not a lunatic could believe he possessed such power. There was, therefore, no need on the part of the prosecution to negative his belief in such power or capacity. The magistrate rightly drew an inference that the appellant had an intent to deceive and impose on the prosecutor. I do not decide whether merely telling fortunes is or is not an offence under the statute, but this advertisement and circular amounted to a pretending and profession to tell fortunes within s. 4 of the Act. I think there was ample evidence on which we ought to hold the magistrate was right." The finding of the magistrate in *Penny* v. *Hanson* (4) was equally open to the magistrate in the present case, namely the finding of an intent to deceive and impose on; but whereas there was

(1) [1899] 1 Q. B. 846.
(2) Ibid. 850.
(3) Ibid. 851.
(4) (1887) 18 Q. B. D. 478; 56 L. T. 235, 236.

the finding in that case, in the present case there is no such finding. In my opinion the magistrate was wrong in refusing to hear evidence on the question of intent, and the case should be remitted to him that he may hear and consider such evidence.

AVORY J. In my opinion the magistrate was right. He says: "I was of opinion that the question of bona fides, in the sense that the appellant herself believed or had persuaded herself that she possessed what she called supranormal power, was quite irrelevant to the issue, because the act of pretending or professing to tell fortunes, especially when done for gain, is prohibited entirely by the statute, which imports that deception is practised thereby irrespectively of the actual frame of mind of the person so pretending or professing." In my opinion that is the true view of the intention of the statute, which must be read with reference to the state of human knowledge as it existed in the year 1824, and as it exists now, and not as it may be hereafter. In my view the Legislature intended to make it unlawful for any person to pretend or profess to tell fortunes and to prohibit any person from so doing. The words are: "Every person pretending or professing to tell fortunes . . . ." If those words had immediately preceded the words "shall be deemed a rogue and vagabond" there could be no doubt as to the meaning. The offence would be complete even though the defendant brought evidence to show his belief in his power to tell fortunes. If the Legislature forbids a thing, it matters not that the defendant believes he can do it. I think the intervening words "or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects" are to be read as a separate offence. If so, the mere pretending or professing to tell fortunes is an offence. In my view the decision in *Reg.* v. *Entwistle* (1) supports this construction. Darling J. in his judgment (2) quotes *Monck* v. *Hilton* (3), where Cleasby B. said: "The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so)"—that is precisely what the magistrate in this case held. Darling J. proceeds: "I agree with that. I think that the use in the statute of the

(1) [1899] 1 Q. B. 846. (2) Ibid. 850.
(3) (1877) 2 Ex. D. 268, 276.

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words 'pretending or professing to tell fortunes,' without resorting to that part of the statute which contains the words 'to deceive and impose on,' does import that deception is practised by doing so. In my opinion if a person were to say, 'I am not a real fortune teller; I cannot tell fortunes; what I am about to tell you must not deceive in any way, but I will pretend or profess to tell your fortune by the use of the ordinary means which people use to tell fortunes,' there no offence would be committed, because, if an offence were charged, it would be a sufficient defence to prove that there was no intention to deceive, but that what was done was done simply as an amusement." In such a case a magistrate would be justified in saying there was no pretending or professing; but where a defendant makes a living by telling fortunes, that is not mere amusement. In my opinion the magistrate was justified in refusing to admit the evidence which could not have altered his view and would be irrelevant to the issue he had to decide.

DARLING J. I agree with the judgment of my brother Sankey. It seems to me that the passages he has quoted justify the conclusions at which he has arrived. If the acts mentioned in the statute are done with no intention to deceive, there is no offence; if they are done with an intention to deceive, there is an offence. I cannot satisfy myself that a man can exhibit an intention to deceive by stating a thing in which he genuinely believes. Some people may still believe that the world is flat. If they state their beliefs and attempt to prove them they ought not on that account to be charged with an intention to deceive, although, if their beliefs are without foundation, they may in fact deceive themselves and others. I cannot agree with my brother Avory in his view of *Reg.* v. *Entwistle.* (1) I think the effect of that case is as stated by Sankey J. The passage which he read from the judgment of Channell J. to my mind proves this conclusively: "If there is not deceit, there is not any pretending or professing." The meaning of the Act becomes clearer if the words are taken separately. "Professing" of itself imputes no dishonesty, as "pretending" does; it is professing with intent to deceive that is aimed at. The criticism of my brother Avory does not refute the

(1) [1899] 1 Q. B. 846.

interpretation of *Reg.* v. *Entwistle* (1) given by my brother Sankey. As to the passage which I cited from *Monck* v. *Hilton* (2), I well remember that case being argued by Mr. Henry Matthews. The appellant had been convicted of using a subtle craft, means, or device by palmistry or otherwise to deceive. The question was whether the means used came within the words "by palmistry or otherwise." Cleasby B. in dismissing the appeal said: "We are not construing such words as 'palmistry and any other art' standing by themselves . . . . The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so), or use subtle devices, by palmistry or otherwise, to defraud." In his view pretending to tell fortunes imports deception, because the statute says "pretending or professing to tell fortunes . . . . to deceive." In *Reg.* v. *Entwistle* (1) I merely intended to express agreement with Cleasby B. This is borne out by the passage in my judgment (3): "I do not intend to hold that it is not necessary there should be an intent to deceive." All that the Court intended to decide in *Reg.* v. *Entwistle* (1) was that, there being evidence of an intent to deceive, it was not necessary that the information should contain the words "with intent to deceive," as such an intent is implied in the words "pretending and professing." When the case comes before him again the magistrate may consider that the defendant cannot have believed in what she was professing to believe. Be that as it may, he was wrong in treating an intention to deceive as if it were immaterial, and in holding that, whether the defendant believed she had power to foretell events, or whether she knew she had no such power but intended to deceive, an offence was in either case committed. If certain things are done with an intent to deceive then an offence is committed, but if they are done with an honest belief in the possession of power to do them, and with no intention of deceiving any one, then the magistrate ought to acquit. The case will be remitted to the magistrate that he may hear the evidence.

Appeal allowed.

Solicitors for appellant: *Turner & Co.*

Solicitors for respondent: *Wontner & Sons.*

(1) [1899] 1 Q. B. 846. (2) 2 Ex. D. 268, 276.
(3) [1899] 1 Q. B. 850.

W. H. G.

1917
Oct. 26.

CARRERAS, LIMITED *v.* CUNARD STEAMSHIP COMPANY, LIMITED.

[1917 C. 633.]

Insurance—Fire—Goods in Warehouse—Agreement by Warehouseman to insure—Value of Goods—Liability for Increase.

The defendants agreed with the plaintiffs that goods of the plaintiffs arriving in the defendants' ships should be warehoused by the defendants at a weekly rental which was to cover fire insurance. The agreement did not specify any sum for which the goods were to be insured, but from time to time as goods arrived and were warehoused the Customs entries relating to the goods, which showed the cost price of the goods in London, were handed to the defendants. A fire occurred in the defendants' warehouse and some of the plaintiffs' goods were destroyed. The value of these goods at the time of their deposit in the warehouse and as shown by the Customs entries was 1125*l.*, but at the date of the fire the goods had increased in value and were worth 1968*l.* In an action by the plaintiffs to recover the latter sum:—

Held, that it was the duty of the plaintiffs under the agreement to declare to the defendants the value to be placed on the goods for the purpose of insurance, and that as the only value made known to the defendants was that shown in the Customs entries the defendants' liability was limited to that amount.

Action in the commercial list tried by Bailhache J. without a jury.

The plaintiffs were manufacturers of cigarettes. For the purposes of their business they used large quantities of paper goods, some of which they imported from America. By an agreement made between the plaintiffs and the defendants in November, 1915, the defendants agreed to warehouse such of the goods of the plaintiffs ex the defendants' ships as the plaintiffs should desire at a rental of 4*d.* per cubic ton measurement per week, this rental to cover and include insurance against loss or damage by fire. In pursuance of this agreement as the plaintiffs' goods arrived from time to time in the defendants' ships they were stored in the defendants' warehouse, and it was the practice of the plaintiffs on the arrival of the goods to hand to the defendants the Customs entries relating to the goods in question, the values stated in which showed the cost price of the goods in London at the date of their arrival. In some cases the

plaintiffs instructed the defendants to insure the goods against aircraft risks, which were not covered by the agreement, and in these cases the plaintiffs gave as the value of the goods for the purpose of the aircraft insurance the amount shown in the Customs entries.

On August 18, 1916, a fire occurred at the defendants' warehouse and some of the plaintiffs' goods were damaged and destroyed. The cost to the plaintiffs of these goods as shown by the Customs entries was 1125*l.*, but the plaintiffs alleged that at the time of the fire the goods in question had advanced in price and were worth to them 75 per cent. in excess of the cost price, or 1968*l.* in all. The defendants paid to the plaintiffs 1125*l.*, which they contended was the full extent of their liability for the loss of, and damage to, the goods by the fire. The plaintiffs claimed in this action to recover 843*l.*, the difference between 1125*l.* and 1968*l.*

The defendants had a floating policy for 20,000*l.* with the British Dominions General Insurance Company, by which all goods deposited in their warehouse were insured against fire "subject to the conditions of average" recited on the back of the policy. The conditions of average, which were "applicable only when expressly referred to" in the policy, included the following clause: "Whenever a sum insured is declared to be subject to average if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable share of the loss accordingly."

Foote, K.C. and *Tebbs*, for the plaintiffs. The plaintiffs are entitled to recover from the defendants the value of the goods according to the prices current at the date of the fire: Bunyan on Fire Insurance, 6th ed., p. 264. There is a difference in this respect between fire insurance and marine insurance. In the latter case the value taken is the value at the commencement of the risk: Macgillivray's Insurance Law, pp. 672, 674. The defendants by their contract have undertaken to indemnify the plaintiffs against loss or damage to their goods by fire. If the goods had depreciated in value the loss would have fallen on the plaintiffs; but as the value has in fact increased the defendants are liable to make good the

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loss of that increased value. It is immaterial to the plaintiffs that the defendants reinsured their risk by a policy which contained an average clause and were thus prevented from recovering the full amount of the loss.

R. A. Wright, K.C., and *Le Quesne*, for the defendants. There is no authority for the suggested difference between fire and marine insurance, or for the contention that under a contract of this kind the defendants are liable for the increased value of the goods. The defendants were in the position of warehousemen who had agreed to insure, that is to say, they made themselves liable for damage by fire to exactly the same extent as if a specific insurance on each consignment of goods had been effected. If that had been done, either by a valued policy or an open policy, the defendants in either case would only have been liable for the value of the goods at the time they entered the warehouse, which was the only value ever communicated to the defendants. If the plaintiffs desired to insure a possible increase in value they should have given definite instructions to the defendants. They not only did not do so, but, on the contrary, when giving instructions for aircraft insurance the only value which they gave was that contained in the Customs entries. The defendants as warehousemen have no means of ascertaining whether there has been an increase in the market value of goods deposited with them. Further, all fire insurance policies now contain an average clause, and therefore the contract in this case must be read as if it contained an average clause, and on that ground the plaintiffs are not entitled to recover the full amount of the loss.

Foote, K.C., in reply. An average clause must be expressed in the policy or contract of insurance; it cannot be implied: Macgillivray's Insurance Law, p. 902.

BAILHACHE J., after stating the facts, continued as follows: The question to be determined in this case is, are the defendants liable to the plaintiffs for the value of the plaintiffs' goods at the time of the fire, or are they liable only for the invoice price of the goods, that is, the cost of the goods at the time when they were deposited in the defendants' warehouse? The contract provided that the rent of 4*d.* per ton per week was to cover insurance against fire. The defendants had a floating policy for 20,000*l.* with the British

Dominions General Insurance Company upon all the goods in the particular warehouse. It was a six months' policy, and was renewed each half-year. The defendants made a claim on the insurance company upon the basis on which they were prepared to pay, and have paid, the plaintiffs. So far as I know, there is no authority exactly in point—at any rate, none has been cited to me; and it is necessary, therefore, to consider what is a reasonable course of business in a case of this kind. It is clear that under this contract it would have been open to the defendants to take out separate policies in respect of each consignment of the plaintiffs' goods as it came to hand, and in that case it would have been necessary to declare to the underwriters the value which was to be put upon the goods for the purpose of the insurance. I am unable to see how, in the absence of express instructions from the plaintiffs, the defendants could have put any other value upon the goods than that which appeared in the documents supplied by the plaintiffs, and that value was the cost price of the goods in London. On the other hand, the defendants might have insured, as they did in fact, by means of a floating policy, which is a very common, if not the most common, way for warehousemen to insure. A floating policy, I believe, invariably contains a maximum limit to which the goods in the warehouse are covered. When a warehouseman insures under a floating policy, it is necessary for him, if he is a prudent man, to know from time to time whether the policy is sufficient to cover the sum which he will have to pay if the goods in his warehouse are destroyed. I fail to see how the warehouseman is to calculate whether or not he is fully covered by his floating policy if he does not know from time to time the maximum sum for which he is liable to each of the persons who has entrusted his goods to him; but a warehouseman cannot be expected to study the fluctuations of the market in respect of all the different kinds of goods stored in his warehouse. The only information which he can get is that which he obtains from the persons who deposited the goods with him. In this case the information which the defendants had was the value shown in the Customs entries, and such inference, if any, as they ought to have drawn from the value which was put upon the goods for the purpose of aircraft insurance. But it is possible that a warehouseman may prefer to be his own insurer and run his own risk. In that case, also, he would

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Bailhache J.

require to know from time to time what risks he is running for the purpose of ascertaining whether he is quoting an appropriate rate for the storage and insurance of the goods deposited in his warehouse. Therefore, whichever way one looks at the position, a warehouseman is in my opinion entitled to know what value is placed upon the goods for insurance purposes by the person who deposits them in the warehouse; and if that person desires to have the goods insured for any particular value other than that appearing from the documents handed to the warehouseman it is for him to give the necessary information to the warehouseman. Whether, therefore, one regards the defendants as being their own insurers or as persons who insured the goods by a floating policy, the maximum sum for which the defendants are liable under their contract with the plaintiffs is the value of the goods destroyed as disclosed by the Customs entries, confirmed as it was, if confirmation be necessary, by the value put on the goods by the plaintiffs for the purpose of insurance against aircraft risks.

It has, however, been contended for the plaintiffs that, even if the figures of the Customs entries are to be taken as limiting the value of the goods for insurance purposes, the defendants are nevertheless liable to pay the full amount of the plaintiffs' claim because that amount is in fact less than the total sum of the values in the Customs entries. If the insurance was a marine insurance covering goods in warehouse, it is clear that the defendants would not be liable for the full amount of the loss, but only for the proportion which the loss bears to the amount for which the whole of the goods were in fact insured, and the defendants' policy with the British Dominions General Insurance Company contains an average clause which would give effect to what I have stated and would make this particular fire insurance stand on the same footing as a marine insurance on goods in similar circumstances. Mr. Foote has argued that the presence of an average clause is essential, and that if there be no average clause a fire policy on goods must be construed as having a different effect from a marine policy on goods. Assuming that that is the law, I can only say that average clauses are now almost universally inserted in fire policies on goods; and when the defendants agreed that the 4*d.* per ton per week was to cover insurance against fire, it must be taken that they meant,

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and were understood to mean, that, if they became their own insurers, they would insure on the same terms as fire insurance companies insure—that is to say, upon the terms of having an average clause implied in their insurance contract. If, therefore, an average clause is necessary, I hold that an average clause is now so common that I must read an average clause into this contract with the defendants. I incline to the view, in the absence of authority,—and no authority has been cited to me—that an average clause is not necessary in a case of this kind.

The result is that the defendants have in my opinion fully discharged their liability under the contract, and I give judgment for them.

Judgment for defendants.

Solicitors for plaintiffs: *Radford & Frankland.*

Solicitors for defendants: *William A. Crump & Son.*

F. O. R.

MITCHELL-HENRY *v.* NORWICH UNION LIFE INSURANCE SOCIETY, LIMITED.

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Nov. 14.

[1917 M. 425.]

Payment—Remittance by Post—Implied Request.

The defendants sent a written notice to the plaintiff stating that a sum of 48*l.* 5*s.* 8*d.*, which would shortly become due to them from the plaintiff, should be paid at their office, and asking the plaintiff, "when remitting," to return the notice. The plaintiff sent to the defendants by registered post a packet containing 48*l.* in Treasury notes and a postal order and stamps for 5*s.* 8*d.* The packet was stolen before it reached the defendants and they never received the money:—

Held, that by the use of the word "remitting" the defendants had impliedly authorized the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as 48*l.* in Treasury notes by post, and that the plaintiff had, therefore, failed to prove that he had paid his debt to the defendants.

ACTION tried by Bailhache J. without a jury.

The plaintiff had borrowed 400*l.* from the defendants on the security of a mortgage, repayable by half-yearly instalments of 40*l.*

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and interest on May 15 and November 15 in each year. On May 9, 1916, the defendants' secretary wrote to the plaintiff that the first instalment of 40*l.* and 8*l.* 5*s.* 8*d.* for interest would become due on May 15, and asking that the amount should be paid on that day at the defendants' office at 13, Southampton Street, Holborn. The letter added: "Please return this notice when remitting." On June 13 the plaintiff posted to the defendants a registered letter (for which he paid a registration fee of 3*d.*) containing 48*l.* in Treasury notes, and the balance in a postal order and stamps. The letter was delivered by the postman to a boy in charge of the lift in the block of buildings in which were the defendants' offices. The boy, who was not in the service of the defendants but of the landlord of the premises, did not deliver the letter to the defendants, and stole the money.

A short time after the loss had occurred a marginal note in the following terms was placed on the notepaper in use at some of the defendants' branch offices, including the office at 13, Southampton Street: "All cheques, money orders, and postal orders should be crossed and made payable to 'Norwich Union Life Insurance Society or order.' Cash, bank notes, and Treasury notes should be sent per prepaid registered post."

The plaintiff claimed a declaration that he had paid the instalment and interest due on May 15, 1916.

Barrington-Ward, for the plaintiff. When a debtor sends money to his creditor by post and it is lost, the loss falls on the creditor if he has, either expressly or by implication, requested or directed the debtor to send the money through the post: *Warwicke* v. *Noakes* (1); *Pennington* v. *Crossley & Son.* (2) The use of the words "when remitting" in the defendants' application for payment was an implied request to send the money by post.

Tooth, for the defendants. If the use of the word "remitting" can be said to imply a request to make the payment through the post, it cannot amount to more than a request to send the money by post in the manner in which a prudent person would do so in the ordinary course of business: *Norman* v. *Ricketts.* (3) It is not

(1) (1791) 1 Peake, 98. (2) (1897) 77 L. T. 43.
(3) (1886) 3 Times L. R. 182.

usual to send so large a sum as 48*l.* in Treasury notes through the post. It has been held in Scotland that it is not in the ordinary course of business to send an uncrossed bearer cheque by post: *Robb* v. *Gow & Co.* (1) The plaintiff should have sent a crossed cheque, or if he desired for any reason to send Treasury notes he should, when registering the letter, have paid the higher fee of 5*d.*, which would have entitled him, in the event of loss, to recover from the Postmaster-General.

Barrington-Ward in reply. The fact that the defendants subsequently invited the sending of Treasury notes by registered letter shows the meaning which they attached to the word "remit," and in the face of that invitation it cannot be said that as between the defendants and their debtors it was not in the usual course of business to send Treasury notes by post.

BAILHACHE J. The question in this case is whether the plaintiff has paid to the defendants the sum of 48*l.* 5*s.* 8*d.* That question, though simple in statement, is by no means easy to decide in the circumstances. By the ordinary law it is clear that a debtor must seek out his creditor and pay his debt at the creditor's house or place of business. Therefore it was prima facie the duty of the plaintiff to pay the defendants at their office. But this duty may sometimes be varied by a creditor intimating to his debtor that he is prepared to receive payment through the post, and in modern times payment of debts is more usually made in that way. It was decided by the Court of Appeal in *Pennington* v. *Crossley & Son* (2) that where there has been a practice between parties to make payments by cheques sent through the post, that fact is not of itself sufficient evidence from which can be inferred a request by the creditor for payments to be made in that way. There must be a request, either express or implied, but very little evidence beyond a course of dealing is evidence of an implied request. It is said in this case that the defendants' letter of May 9 contains an implied request. I think that the earlier part of the letter, if taken by itself, is a request to pay at the defendants' office, but the letter goes on to say: "Please return this notice when remitting." It was a notice in the ordinary form which the defendants sent to their customers throughout the

(1) (1905) 8 F. 90. (2) 77 L. T. 43.

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MITCHELL-HENRY v. NORWICH UNION LIFE INSURANCE SOCIETY.

Bailhache J.

country. I am inclined to think, though not without some doubt, that the use of the word "remitting" is sufficient evidence of a request by the defendants to the plaintiff to make the payment through the post. That is the ordinary meaning of the word "remit," and the plaintiff was entitled to read the notice as meaning that the defendants were prepared to receive payment through the post.

The question then arises, How was the remittance to be made? It must be made in the ordinary way in which sums of money are remitted through the post. I should have thought, and there is no evidence to the contrary, that the ordinary way in which such a sum as 48*l.* 5*s.* 8*d.* would be sent through the post would be by a cheque, and that it would be a reasonable precaution to make it a crossed cheque payable to order. The plaintiff, however, sent 48*l.* in Treasury notes and the balance in a postal order and stamps. He did not insure the packet as he might have done by paying a registration fee of 5*d.*, but I do not think that he can be said to have been negligent in not doing so. Mr. Barrington-Ward has drawn my attention to the fact that shortly after the loss of this money one of the defendants' managers caused to be placed on the notepaper in use at some of their branches, including the one in question, a marginal note which states that cheques should be crossed and made payable to the defendants or order, and that cash, bank notes, and Treasury notes should be sent by registered post. If that marginal note had been in use at the time when the notice requesting payment was sent to the plaintiff I should have had very little doubt but that a debtor of the defendants sending money in Treasury notes, as the plaintiff did, was sending it in a way in which he was authorized by the defendants to send it. But the marginal note was not put upon the defendants' notepaper until July, 1916.

It has been contended, however, that that marginal note is evidence to show that it is not unusual to send such a sum as 48*l.* in Treasury notes by post, and that by the use of that marginal note the defendants were in effect telling their customers that they recognized that method to be a usual one. It is in respect of this contention that I think the real difficulty of the case arises. But for the use of this marginal note I should have had no hesitation in acting on my own impression that, although it may not be an unusual

thing to send small sums in Treasury notes by post, it is not in the ordinary course of business to send so large a sum as 48*l.* in that manner. Then, ought I to come to a different conclusion merely because the defendants subsequently had this marginal note placed upon their notepaper? I think not. I think that the note may be fairly read as meaning that where the sum is of such an amount as it is usual and proper to send by post in Treasury notes, then it may be sent in that way by registered letter; but I cannot construe it as an intimation by the defendants that large sums of money may be sent in Treasury notes by post.

I have therefore come to the conclusion that, although it is possible to infer from the use of the word "remitting" an intimation by the defendants that they were prepared to receive payment through the post, I cannot attach such force to the use of that word as to hold that it is a request to send the money by post in an unusual way, and in my view it is at the present day unusual to send so large a sum as 48*l.* in Treasury notes through the post. The plaintiff has therefore failed to satisfy me that he has paid this sum, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiff: *Mount, Sterry & Wheeler.*
Solicitors for defendants: *Collisson, Pritchard & Bonner.*

F. O. R.

1917
Nov. 21.

CLARKE BROTHERS *v.* KNOWLES.

County Court—Prohibition—Action brought in District where no Part of Cause of Action arose—Absence of Jurisdiction—Step taken by Defendant in Proceedings — Waiver — County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 74.

By s. 74 of the County Courts Act, 1888, "every action or matter . . . . may be commenced by leave of the judge or registrar . . . . in the court in the district of which the cause of action or claim wholly or in part arose":—

Held: (1.) That where a contract is made by offer and acceptance sent through the post between parties residing in different county court districts the posting of the offer is not part of the cause of action within the meaning of that section.

(2.) That the demand by the defendant for particulars of the claim, in order to enable him to ascertain whether any part of the cause of action arose within the district in which the action is brought, and the giving by him of an address for service are not such steps in the action as to disentitle him to object to the jurisdiction of the Court.

Appeal from a judge at chambers.

The plaintiffs, who are a firm carrying on business at West Hartlepool in the county of Durham, in December, 1915, made a contract by correspondence through the post with the defendant, who carried on business at Croydon, for the purchase from the defendant of a quantity of glass and scrap wire. The defendant having failed to deliver the goods in accordance with the contract, the plaintiffs in May, 1917, applied to the registrar of the West Hartlepool County Court under s. 74 of the County Courts Act, 1888, for leave to commence an action against the defendant for breach of the said contract in the West Hartlepool County Court. The affidavit upon which, as required by Order v., r. 13, of the County Court Rules, the application was based stated "That the facts relied on as constituting the alleged cause of action or a part thereof are, that the written offer made by the proposed plaintiffs and accepted by the proposed defendant in respect of the sale of the goods for the breach of which contract an action is proposed to be brought was made and posted by the proposed plaintiffs at West Hartlepool, within the district of this Court." The registrar granted the leave

asked for, and the defendant was on May 22 served with a summons. On the following day the defendant's solicitor wrote to the plaintiffs' solicitors as follows: "*Clarke Bros.* v. *Knowles.* I have been instructed by the defendant to defend this action and subject to and without prejudice to any point which the defendant may raise as to jurisdiction or otherwise I send you the enclosed demand for further particulars of the plaintiffs' claim, and shall be glad to receive such particulars in due course. Will you please favour me with a copy of the correspondence between the parties, and of your letters to my client of September 29 and October 3 last, as he unfortunately some months ago had a fire at his premises and certain documents have got destroyed or lost?" The enclosed demand for particulars was as follows: "Take notice that the defendant requires the plaintiffs within two clear days of the service of this notice to file and deliver to him further particulars of the plaintiffs' demand, that is to say (1.) Of the date and terms of the contract alleged as to (*a*) cullett (glass) and (*b*) telephone wire, and whether such contract was verbal or in writing and if in writing identifying the document containing the same. (2.) Of the breach alleged and the date thereof, and of the acts or omissions constituting the breach. I will accept service of all proceedings in this action on behalf of the defendant at my office as below. (Signed) Fredk. Gowen. 78 North End, Croydon." In compliance with that demand the plaintiffs' solicitor delivered the following further particulars: "(1.) The contract is in writing and is contained in letters passing between the plaintiffs and the defendant or his agent between the 15th and 30th days of December, 1915, or some or one of them. By the terms thereof the defendant by his agent sold to the plaintiffs and the plaintiffs bought about 50 tons of cullett at 21*s.* per ton on rail London, and about 5 to 8 tons telephone wire at 45*s.* per ton at West Hartlepool. (2.) The defendant has failed to deliver 42 tons 10 cwts. 2 quarters of cullett and has delivered no wire. The defendant repudiated the said contract on the 30th day of September, 1916, in a letter to the plaintiffs' solicitor."

Immediately upon receipt of those particulars the defendant applied to the judge in chambers for a writ of prohibition to the judge of the West Hartlepool County Court and to the plaintiffs to prohibit them from further proceeding in the action on the

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ground that no part of the cause of action arose within the district of the said county court. The judge dismissed the application. The defendant appealed.

J. B. Matthews, K.C., and *Morle*, for the appellant. The registrar was wrong in giving the plaintiffs leave to commence the action in the West Hartlepool County Court, for that Court had no jurisdiction. The only ground on which it was suggested that the Court had jurisdiction was that part of the cause of action arose within the district, and the only fact relied on in the plaintiffs' affidavit in support of that suggestion was that the letter containing the offer to purchase the goods in question was posted in West Hartlepool. But in an action on a contract the posting of the offer is no part of the cause of action. An offer made through the post is made where the letter is received, not where it is posted, and here it was received in Croydon. But it is said for the plaintiffs that if there was a want of jurisdiction in the West Hartlepool County Court the defendant, by reason of his solicitor demanding further particulars of the plaintiffs' claim and giving an undertaking to accept service at his office, had taken a step in the action and waived the objection. To that contention there are two answers. In the first place the want of jurisdiction appears on the face of the record, that is, in the affidavit on which the application to the registrar was founded, and it is settled law that where the want of jurisdiction appears upon the face of the record a writ of prohibition is a matter of right, and no amount of steps taken in the action by the defendant can disentitle him to the writ: *Farquharson* v. *Morgan* (1); the reason being that "The Court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior Court from proceeding in matters as to which it is apparent that it has no jurisdiction": per Lord Halsbury. Secondly, even if the defect here did not appear on the face of the proceedings, the application for further particulars and the giving of an address for service are not such steps in the action as amount to a waiver of the objection to the jurisdiction. In *Lee* v. *Cohen* (2), the action having been brought in the Mayor's Court, the defendant entered an appearance, not under protest, and applied for particulars of the plaintiffs'

(1) [1894] 1 Q. B. 552, 556. (2) (1894) 71 L. T. 824.

claim, and subsequently for discovery. As soon as he ascertained the nature of the claim he objected to the jurisdiction of the Court on the ground that the whole of the cause of action had not arisen within that jurisdiction, and it was held by the Court of Appeal that he had not, by entering appearance and taking the other steps that he did, waived his right to a writ of prohibition. That is a much stronger case than the present.

A. Neilson, for the respondent. The West Hartlepool Court had jurisdiction, for part of the cause of action arose within that district. The offer to purchase was part of the cause of action: *Green* v. *Beach* (1); and that offer was for this purpose sufficiently made in West Hartlepool where it was posted. Every fact which the plaintiff has to prove to make out his case is part of the cause of action, and, where the action is upon a contract made through the post, among the facts which the plaintiff must prove is that he posted the offer. Secondly, if that contention is wrong, the defendant waived the objection to the jurisdiction. When it is said that a want of jurisdiction appearing on the face of the record cannot be waived the correctness of the proposition depends on what is meant by want of jurisdiction. Where the subject-matter of the action is one which prima facie, and in the absence of a formal consent in writing under s. 64 of the County Courts Act, 1888, no county court has jurisdiction to try, such as libel, seduction, or breach of promise of marriage, no steps taken in the action by the defendant can operate as a waiver. But where the county court has generally jurisdiction over the subject-matter, but that jurisdiction in the particular case is contingent on a particular fact being proved, such as that part of the cause of action arose within the district, the objection to the jurisdiction arising from the plaintiff's inability to prove that fact may be waived by the defendant taking a step in the action. The objection in this latter class of cases falls, as was pointed out by Cave J. in *Moore* v. *Gamgee* (2), under the head of "procedure" rather than of "jurisdiction." That case, like the present, was one in which the action was brought in the wrong county court, and it was held that the defendant, by appearing and not objecting until after the hearing had been adjourned, had lost his right to object. "Where an inferior Court has no jurisdiction from the beginning, a party by

(1) (1873) L. R. 8 Ex. 208. (2) (1890) 25 Q. B. D. 244, 248.

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taking a step in a cause before it does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards": per Erle J. in *Jones* v. *James*. (1) Here the defendant, by making a formal demand for further particulars, waived his right to object, and the fact that in the covering letter he stated that he made the demand "without prejudice" did not affect the position.

Matthews, K.C., in reply.

LAWRENCE J. This is an appeal against the refusal of the judge in chambers to order a writ of prohibition to the judge of the West Hartlepool County Court and the plaintiffs to prohibit them from further proceeding in the action. As the defendant did not reside or carry on business within the district of that Court it was necessary for the plaintiffs under s. 74 of the County Courts Act, 1888, to establish that a part of the cause of action arose within the district as a condition of obtaining leave from the registrar to commence the action in that Court. The affidavit upon which the plaintiffs' application for such leave was made stated that the fact relied on as showing that a part of the cause of action arose within the jurisdiction was that the plaintiffs' written offer to purchase the goods in respect of which the action was brought was made and posted at West Hartlepool. It was contended by the defendant that the posting of the offer did not constitute part of the cause of action, and that the registrar ought not to have granted the leave asked for. I agree that the posting of the offer was no part of the cause of action. The making of an offer is part of the cause of action, but an offer is made where it is received, and that in this case was at Croydon. I think, therefore, that there was no jurisdiction in the West Hartlepool County Court to deal with the case. But Mr. Neilson mainly relied on the contention that the defendant had waived his right to object to the want of jurisdiction. He argued that the fact of the defendant's solicitor having made a formal demand for further and better particulars of the plaintiffs' claim amounted to waiver. At first sight that demand does look like a

(1) (1850) 19 L. J. (Q.B.) 257.

step taken in the action, but on reflection I think it was not. The reason for demanding further particulars was that the original particulars appearing on the affidavit above mentioned did not enable the defendant to determine with precision whether the Court had jurisdiction or not. Under those circumstances I do not think that it can be fairly said that the defendant acquiesced in the jurisdiction of the Court, especially as the demand was contained in a covering letter in which it was expressed to be made "without prejudice." The case of *Lee* v. *Cohen* (1) supports that view. It was there held that where an action has been commenced in the Mayor's Court the defendant does not by entering appearance and applying for further and better particulars waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is. That case is even a stronger one than the present, for there the defendant entered appearance and without any protest. It is not necessary for us to decide whether the principle of *Farquharson* v. *Morgan* (2) applies to the facts of this case, so as to prevent the defendant's conduct, even though amounting to a step in the action, from depriving him of his right to object to the jurisdiction of the Court.

LUSH J. In this case three questions were discussed. First, whether a part of the cause of action arose within the jurisdiction of the West Hartlepool County Court. If any part of it did so arise the writ of prohibition was properly refused. Mr. Neilson said that what was meant by the "cause of action" was all those facts which the plaintiffs must prove to establish their claim; that one of those facts was the sending of the offer to buy the goods, and that as the letter containing that offer was despatched from West Hartlepool part of the cause of action arose within that district. With that contention I cannot agree. The material question is not where the offer was sent from but where it was made, and the making of the offer is proved by showing that it was received. Therefore the offer here was made in Croydon. The posting of it was no part of the cause of action. Secondly, it was contended for the defendant that as the affidavit before the registrar disclosed that the cause of action arose wholly outside the district the want of jurisdiction

(1) 71 L. T. 824. (2) [1894] 1 Q. B. 552.

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LUSH J.

was apparent on the face of the proceedings, and that in such case it becomes unnecessary to consider the question of waiver, because no amount of steps taken in the action can oust the defendant's right to ask for prohibition. For that contention reliance was placed on the case of *Farquharson* v. *Morgan*. (1) It is not necessary for us to decide whether that decision is applicable to the present case for the reason given by my brother Lawrence that no step was here taken in the action by the defendant. But it is to be observed that in *Farquharson* v. *Morgan* (1) there was a total absence of jurisdiction. There the county court judge was asked to enforce under s. 24 of the Agricultural Holdings Act, 1883, an award by which compensation was awarded for matters wholly outside that Act. In such a case no county court could have jurisdiction. It was not like the question whether the action ought to be brought in one county court rather than another. There the Court of Appeal reluctantly held that the defendant was entitled to a writ of prohibition notwithstanding that he had by his conduct acquiesced in the exercise of jurisdiction by the county court. The present case is very different; there was here no total absence of jurisdiction. The subject-matter of the action being an ordinary breach of contract, and the amount claimed being within the county court limits, the action was one over which the county court had generally jurisdiction. It is true the registrar had no power to give leave to bring the action in his Court, but that defect of jurisdiction attached only to the particular Court. Sect. 74 says that the action must be commenced in the district in which the defendant dwells or carries on business, except in two cases, one of which is that the plaintiff may by leave of the registrar bring the action in a district in which part of the cause of action arose. The objection that no part of the cause of action arose in the district in which the action is brought is one of procedure rather than of jurisdiction. That is the distinction between this case and *Farquharson* v. *Morgan*. (1) If I had come to the conclusion that the defendant here had acquiesced in the West Hartlepool County Court entertaining this claim I should have said that prohibition was rightly refused. That brings me to the third question. Has the defendant waived the objection? His solicitor sent a written demand for further particu-

(1) [1894] 1 Q. B. 552.

lars of the plaintiffs' claim, which concluded with an expression of readiness to "accept service of all proceedings in this action on behalf of the defendant at my office as below." It was said that amounted to an undertaking to act as solicitor in the action. I do not think that that is the right view. No doubt if the defendant takes a step in the action it is not enough to say that he does so without prejudice, if it is really a step taken with the object of securing success. But here the plaintiffs in their original affidavit did not say where the contract was made, or give the defendant sufficient information as to where the cause of action arose. That obliged him to ask for further particulars, and when doing so it was necessary for him to tell the plaintiffs to what address the particulars should be sent. That is, I think, all that the last paragraph in the demand for particulars meant. I think, therefore, it is quite plain that the defendant did not acquiesce in the Court's exercising jurisdiction. The case of *Lee* v. *Cohen* (1) is an express decision that the act here relied on by the plaintiffs is not such an act as amounts to a waiver of the defect. The defendant is therefore entitled to the prohibition sought.

Appeal allowed.

Solicitor for plaintiffs: *J. H. Smith, West Hartlepool.*
Solicitor for defendant: *F. Gowen, Croydon.*

(1) 71 L. T. 824.

J. F. C.

1917
Nov. 23.

AYREY *v.* BRITISH LEGAL AND UNITED PROVIDENT ASSURANCE COMPANY, LIMITED.

Insurance—Life—Concealment of Material Fact—Knowledge of District Manager—Subsequent Receipt of Premiums—Waiver—Principal and Agent—Knowledge of Agent imputed to Principal.

The proposal form for a policy of life insurance contained a clause providing that if any information which ought to be made known to the insurance company with reference to the assurance were withheld the policy would be absolutely void. The assured was described in the proposal form as a fisherman, which was his ordinary occupation. The fact that he was also a member of the Royal Naval Reserve, and was therefore exposed to additional risks, was not stated in the proposal form, but was communicated verbally to the district manager of the insurance company, and the premiums due under the policy were subsequently paid to and accepted by the district manager. In an action on the policy:—

Held, that the district manager's knowledge of the true facts was the knowledge of the company; that the acceptance of the premiums by the district manager was a waiver by the company of the breach of the clause in the proposal form; and that the policy was therefore not invalidated.

APPEAL from the county court of Lancashire holden at Blackpool and Fleetwood.

The plaintiff claimed as executrix of Alexander Mackenzie, deceased, upon a policy of insurance issued by the defendants upon the life of Alexander Mackenzie. It appeared from the evidence given in support of the plaintiff's case that on November 16, 1914, Mackenzie signed a proposal form for an insurance on his life by the defendant company. His occupation was stated in the form to be that of a fisherman, which was the fact. He was also at that date a member of the Royal Naval Reserve Service and was expecting to be called up for the purpose of being employed in mine-sweeping. These facts were communicated to an agent of the defendants who was present when the proposal form was signed. At the date when Mackenzie signed the proposal form he had received orders to report at Devonport for service, which he did on that day. A few days

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afterwards the plaintiff asked the defendants' agent whether, in view of the fact that Mackenzie had gone on service and would be employed in mine-sweeping, the insurance money would be paid. The agent referred the matter to one of the defendants' superintendents, who was also their district manager for the locality in question. The latter saw the plaintiff and told her that the insurance money would be paid although Mackenzie had gone mine-sweeping. The plaintiff thereupon continued to pay the premiums, in some cases to the district manager and in others to the company's agents. Mackenzie was drowned at sea on July 20, 1916. The circumstances of his death were not known, but he had in fact never been employed in mine-sweeping or other dangerous work.

The proposal form contained the following declaration: "I do hereby declare that the foregoing particulars are true in every respect to the best of my knowledge and belief, and I agree that the questions and answers taken together shall be the basis of the contract between the company and myself; that if anything contrary to the truth be stated therein, or if any information which ought to be made known to the company with reference to the proposed assurance has been withheld, the policy to be granted in pursuance of the above proposal shall be absolutely void, and all money paid on account thereof shall be forfeited to the company; and I further agree to be bound by the conditions upon the policy to be delivered in pursuance of this proposal, and that the assurance hereby proposed to be effected shall not incur upon the company any liability until the policy has been delivered and the premium paid." The conditions on the policy included the following: "2. All statements made and acts done by any person other than the assured in connection with the proposals and warranties within referred to, or otherwise in connection with this policy shall be deemed as between the assured and the company, so far as the same shall be relevant hereto, to have been made and done by such person for and on behalf of the assured and not the company. This condition applies equally although such person be an agent of the company, the authority of such agent being hereby expressly declared not to include the acceptance of proposals, declarations or warranties, and shall be deemed to have been received by him as

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agent for the assured for the purpose of submitting the same to the company."

The defendants gave notice that they intended to rely upon the following grounds of defence—namely, that Mackenzie had falsely represented on the proposal form that he was a fisherman, and had concealed the material fact that he was a member of the Royal Naval Reserve and had actually joined up for service, and that by reason of the misrepresentation and concealment the policy was void.

No witnesses were called at the trial by the defendants.

The county court judge found as facts that the deceased at the time he signed the proposal form was correctly described as a fisherman and that he told the agent that he was in the Royal Naval Reserve Service and liable to all the risks of that service, including mine-sweeping, that the superintendent and district manager was likewise informed before any premiums were paid, and that premiums were paid and accepted after the district manager had received this information. He held that in spite of these findings there was no evidence to show that the agent who filled up the proposal form ever submitted to the defendants before the issue of the policy that the deceased was in the Royal Naval Reserve Service and liable to the risks attaching to that service; that by condition 2 of the policy the agent was made the agent of the deceased for this purpose; that the burden of proof was upon the plaintiff to show that the defendants had knowledge that the deceased was in the Royal Naval Reserve Service either before or at the time of the issue of the policy; and that the plaintiff had failed to prove this. He therefore held that the policy was void and gave judgment for the defendants.

The plaintiff appealed.

Cotes-Preedy, for the plaintiff. On the facts found by the county court judge the plaintiff is entitled to judgment. Both the agent and the district manager were told the true facts: *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.* (1) Condition 2 of the policy only applies to statements made by, not to, an agent of the

(1) [1892] 2 Q. B. 534.

defendants. There was no misrepresentation or concealment of any material fact. But in any case the knowledge of the district manager was the knowledge of the company, and the subsequent acceptance of premiums by the district manager with full knowledge of the facts was a waiver by the defendants of the breach, if any, of the clause in the proposal form. The defendants, as in *Bawden's Case* (1), called no evidence, and, therefore, it must be taken to be the fact that the district manager was the duly authorized agent of the company to receive a communication which the representative of an assured desired to make with reference to a policy issued by the defendants. [He also referred to *Hughes* v. *Liverpool Victoria Legal Friendly Society* (2), *Kettlewell* v. *Refuge Assurance Co.* (3), and *Golding* v. *Royal London Auxiliary Insurance Co.* (4)]

Greaves Lord, for the defendants. The clause in the proposal form provides that the concealment of a material fact invalidates the policy. There clearly was a concealment, because in the proposal form the occupation of the assured was stated to be that of a fisherman, whereas he was also a member of the Royal Naval Reserve, and in that capacity was liable to be exposed to additional risks. The plaintiff relies on a waiver, but there was no evidence that the district manager had any authority to waive a breach of the conditions on which the policy was issued, and there is no presumption that he had that authority. The plaintiff's contention in effect amounts to this, that the district manager made a new contract: *British Industry Life Assurance Co.* v. *Ward.* (5) He had no authority from the defendants to do so: *Biggar* v. *Rock Life Assurance Co.* (6)

LAWRENCE J. I entirely agree with a great deal of what the county court judge said in giving judgment, but I think that his final conclusion was wrong. The assured was a fisherman, and that fact was stated in the proposal form, but he was also a member of the Royal Naval Reserve and had been called up for service. That

(1) [1892] 2 Q. B. 534.
(2) [1916] 2 K. B. 482.
(3) [1908] 1 K. B. 545; [1909] A. C. 243.
(4) (1914) 30 Times L. R. 350.
(5) (1856) 17 C. B. 644.
(6) [1902] 1 K. B. 516.

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Lawrence J.

fact was not stated in the proposal form, but it was communicated to one of the agents of the defendant company at the time the proposal form was signed, and subsequently to the company's superintendent, who was also their district manager. The question is whether the omission to state this fact in the proposal form invalidates the policy. I do not think it does. I think the company must be taken to have waived any objection to the validity of the policy founded upon that omission. It is true that the proposal form contained a declaration that if any information which ought to be disclosed to the company with reference to the proposed insurance had been withheld the policy would be absolutely void, and if the fact of the assured being a member of the Royal Naval Reserve had been concealed it would have invalidated the policy. I also agree that the district manager had no authority to make a new contract on behalf of the company, but it is not necessary, in order to hold the company liable to the plaintiff, to regard the district manager as having made a new contract. It was the duty of the district manager to supervise the company's subordinate agents, and he was the means of communication between them and the head office. The district manager was told by the plaintiff that the assured was in the Royal Naval Reserve and had been called up for service, and it was a reasonable thing for her to assume that the making of that communication to the district manager was equivalent to informing the company's head office. It was not necessary, in my opinion, that the communication should have been made direct to the head office or to the company's general manager. It is clear that the plaintiff believed that the communication to the district manager would be passed on by him to the head office, because on being told by him that the fact of the assured being in the Royal Naval Reserve was immaterial she continued to pay the premiums. The evidence of the plaintiff was uncontradicted, for the defendants called no witnesses. In my opinion the receipt of premiums by the district manager with full knowledge of the facts was a waiver by the company of the objection that there had been a concealment of a material fact. There was no new contract entered into by the district manager, but there was a waiver of the objection to the existing contract. The plaintiff was, therefore, entitled to judgment, and this appeal must be allowed.

ATKIN J. I agree. On the point which seems to have been mainly argued before the county court judge I think his decision was right in so far as it proceeded upon the footing that the officials of the defendant company had no authority to vary the terms of the contract which the assured had entered into. But that is not decisive of the case. The company seek to invalidate the policy on the ground that there was a concealment of material facts by the assured. The evidence shows that the company's agent was told by the assured that he was a member of the Royal Naval Reserve and therefore liable to be exposed to special risks, but he was described in the policy as a fisherman. The county court judge has found as a fact that that description was correct. Speaking for myself, I am not satisfied that there was, within the meaning of the clause in the policy or of the ordinary law of insurance, any concealment of the fact that the man's calling exposed him to special perils. The questions in the proposal form were all answered correctly, and I have great difficulty in seeing how it can be said that an assured, who correctly answers the questions in the proposal form and declares all the facts truly to an agent of the insurance company, has been guilty of concealing material facts, though, having regard to condition 2 of this policy, it may be doubtful whether statements as to material facts made to an agent can be treated as if made to the company. But the decision of this case does not depend upon the meaning or effect of condition 2, for it is clear from the evidence that before any premiums had been paid, and after the question of the assured being in the Royal Naval Reserve had been mentioned to the agent, he reported the matter to one of the company's superintendents who was also the district manager. The latter, having been informed as to all the facts, told the representative of the assured that the policy was valid. In so far as the plaintiff's case rests upon any supposed variation of the contract by the district manager it must fail, because it is quite clear that the district manager had no power to vary the terms of the contract. But after he had been told the true facts he accepted payment of the premiums under the policy for two years, and in determining the question whether the company can now take advantage of a concealment of a material fact it is necessary to consider the question of estoppel.

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The true principle to be invoked is best stated in the judgment of Bowen L.J. in *Bentsen* v. *Taylor* (1), where he said: "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent?" That passage was cited by Viscount Reading C.J. in *Panoutsos* v. *Raymond Hadley Corporation of New York* (2), and applied to a case where the question was whether the defendants were entitled to take advantage of a breach of a condition precedent in a contract, and the question as stated by Bowen L.J. is the question which arises in this case.

For the purpose of the operation of the principle of estoppel it must of course be shown that the company knew that the condition precedent had not been performed, and that depends on whether the knowledge of the district manager must be imputed to the company. I think it must be. I have great difficulty in seeing how an assured who desired to impart information to the company could reasonably be supposed to do so otherwise than by giving the information to the district manager. He is the person who is named on the premium card as the district manager of the company, and in my opinion it must be implied that the person holding that position is the person who has authority to receive on behalf of the company information as to all matters affecting a policy issued by the company, and that it was his duty to pass on to the company such information as he might receive. I think, therefore, that the knowledge of the district manager that there had been a breach of a condition by reason of the concealment of a material fact was the knowledge of the company. The remaining question to be considered is whether the company led the plaintiff to believe that they did not intend to treat the contract as at an end. In my opinion nothing could have been more likely to induce that belief in the mind of the plaintiff than the fact that the district manager to whom she had disclosed the facts which showed that the conditions of the proposal form had not been complied with continued to receive payment of the premiums from her week by week for a period of at least eighteen months.

(1) [1893] 2 Q. B. 274, 283. (2) [1917] 2 K. B. 473, 478.

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For these reasons I think that the decision of the county court judge must be reversed and judgment entered for the plaintiff.

Appeal allowed.

Solicitors for plaintiff: *C. P. Fielder, Le Riche & Co., for R. K. Singleton, Blackpool.*

Solicitors for defendants: *Bramall & White, for A. W. Baucher, Wigan.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.

1917

Nov. 29.

THE KING *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue -Excess Profits Duty—Computation of Profits—Remuneration of Directors and Managers depending on Profits—Deduction—Discretion of Commissioners—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *Sched. IV., Part I., par.* 5.

By Part I., par. 5, of Sched. IV. of the Finance (No. 2) Act, 1915, which deals with the computation of profits for the purposes of excess profits duty, "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires":—

Held, that proof of the fact that the remuneration of the managers of the business depends on the profits does not render it obligatory on the Commissioners to allow the whole of such remuneration to be deducted, but leaves it in their discretion to say whether the deduction of any and what portion of the amount by which such remuneration exceeds that of the last pre-war trade year shall be allowed.

Decision of the Divisional Court [1917] 2 K. B. 405 affirmed.

APPEAL from the decision of a Divisional Court (Viscount Reading C.J. and Ridley and Avory JJ.) (1) discharging a rule nisi for a mandamus to the Commissioners of Inland Revenue

(1) [1917] 2 K. B. 405.

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REX v. INLAND REVENUE COMMISSIONERS.

requiring them to give directions for the deduction of the whole of the remuneration paid to the managing directors of William France Fenwick & Co., Limited, for the purpose of ascertaining the profits returnable by the company as "excess profits."

The company carried on a wharfage business in London and owned certain trading steamers. By an agreement dated February 10, 1909, the company agreed with their three managing directors to pay them as remuneration for their services a sum of 5000*l.* per annum and 10 per cent. of the net profits of the business, to be divided between the three in certain proportions. Having regard to this subsisting contract the pre-war rate of remuneration was 12,056*l.* a year divided between the three directors. That comprised the fixed sum of 5000*l.* and 7056*l.*, representing 10 per cent. of the profits. For the accounting period ending December 31, 1915, the remuneration paid to the managing directors was 23,098*l.*, which was made up of the fixed sum of 5000*l.* and 18,098*l.*, representing 10 per cent. of the profits. For the purposes of excess profits duty the Commissioners assessed the excess profits of the company for the accounting period ending December 31, 1915, at 119,506*l.*, and in the computation of that sum, in the exercise of their discretion under Sched. IV., Part I., par. 5, of the Finance (No. 2) Act, 1915 (1), they were prepared to allow in respect of directors' remuneration a deduction of 6000*l.* in addition to the pre-war amount of 12,056*l.* for the purpose of arriving at the net profits of the company, but refused to allow any further deduction.

The Divisional Court held that the effect of par. 5 was to give the Commissioners a discretion whether they would allow a deduction in excess of what was allowed in the last pre-war trade year, as well where the remuneration of the managing directors depended on the

(1) Finance (No. 2) Act, 1915, Sched. IV., Part I., par. 5, provides: "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires."

profits as where there were to be found special circumstances of any other kind; and they accordingly discharged the rule nisi.

The company appealed.

Disturnal, K.C., and *Bremner*, for the appellants, repeated the arguments urged in support of the rule before the Divisional Court.

Sir Frederick Smith, A.-G., and *Parr*, for the Commissioners, were not called upon to argue, but, following the precedent in *Reg.* v. *Inland Revenue Commissioners* (1), they desired for the purposes of the present case to waive the question whether a mandamus would lie against the Commissioners as servants of the Crown.

SWINFEN EADY L.J. This is an appeal from a judgment of the King's Bench Division discharging a rule that had been obtained for a mandamus to the Commissioners of Inland Revenue, and the appeal raises a question as to the true construction of a clause in the Fourth Schedule, Part I., to the Finance (No. 2) Act, 1915. That statute imposed an excess profits duty, and by s. 40, sub-s. 1, is provided the way in which profits are to be determined for the purpose of that taxation. It says: "The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act."

The question depends upon the true construction of clause 5 of Part I. of the Fourth Schedule. The question is what deduction is to be allowed in respect of the remuneration of the directors where, by pre-war contracts, remuneration is in part dependent upon profits earned.

It is clear that no deduction is to be allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business exceeding the pre-war rate unless the Commissioners otherwise direct. [The Lord Justice stated the facts and continued.]

(1) (1888) 21 Q. B. D. 569.

C. A. 1917

REX v. INLAND REVENUE COMMISSIONERS.

Swinfen Eady L.J.

The whole question turns upon the meaning and the true construction of the words in parenthesis in clause 5 of Part I. of the Fourth Schedule, "unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct." It is contended on behalf of the appellants that the only effect of these words is to give a discretion to the Commissioners to determine whether there are any "special circumstances"—nothing beyond that. It is argued that if the Commissioners determine that there are special circumstances, then the whole of the sum paid for the remuneration of the directors and managers must be allowed, and that there is no further discretion in the Commissioners to allow part of it only.

Then with regard to the alternative words in clause 5, "or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business," it is said that if that fact is established—and there is no dispute as to that here—the Commissioners have no discretion at all; they are bound to "otherwise direct." That is the argument. In substance that does come, as was contended below, to transposing the words "otherwise direct." It in effect makes the exception read as if it ran in this way: "Unless the Commissioners of Inland Revenue, owing to any special circumstances, otherwise direct, or unless the remuneration of any managers or managing directors depends on the profits of the trade or business."

In my opinion the words between brackets are free from any reasonable doubt. They confer a discretion upon the Commissioners with regard to the amount as well as to determining whether there are any special circumstances. Under the first branch of the exception the Commissioners may determine whether there are any special circumstances under which more than the pre-war rate of remuneration to the directors should be allowed to be deducted. It may well be, for instance, without there being any contract to pay additional remuneration to the directors, that by reason of extra and diligent services rendered by the directors the company may think there is a fair case for the payment of extra remuneration, and if the Commissioners take that view

they may allow that sum as a deduction in assessing the profits. That is only one instance; numerous others might occur, but it is for the Commissioners to determine whether there are any special circumstances, and if so, in my judgment they are entitled also to determine the amount that is to be so allowed, because no deduction is to be allowed exceeding the pre-war rate unless the Commissioners otherwise direct; and those words confer a power upon the Commissioners in regard to the amount as well as to the circumstances under which the amount, if any, is to be allowed.

And so with regard to the latter part of the exception. The Commissioners have a discretion where the remuneration depends on the profits of the trade or business as to the amount which may be allowed. An argument was addressed to us as to what reason there could be for the insertion of the second limb of the exception. Having regard to the fact that this Act is dealing with excess profits, which alone are made the subject of taxation, where the remuneration of the directors depends on the profits, probably in all or most cases there would be an increase in the remuneration of the directors; as the profits went up so would the remuneration increase, if dependent on profits. It may have been thought that it was expedient to prevent any question arising as to whether that could be deemed a special circumstance, seeing that it would probably arise in almost every case of excess profits duty; it may have been thought that by way of precaution it was expedient specially to mention it. It may well be that it was for that reason that the second branch of the exception was inserted. But, be that as it may, I am satisfied that taking the words in their natural and ordinary sense and meaning they confer a discretion upon the Commissioners where there are special circumstances, or where the directors' remuneration depends on profits, to direct what sum, if any, is to be allowed in respect of an additional deduction, and that they are not bound as of course to allow the deduction of whatever additional remuneration may in fact be paid to the directors.

I am of opinion that the judgment of the Court below as to the construction of the clause was right and that the appeal fails.

WARRINGTON L.J. I am of the same opinion. The statutory provision we have to interpret enacts that "Any deduction allowed

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Warrington L.J.

for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners "—I am reading it shortly for the moment—" otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year." The appellants contend that, notwithstanding the absence of a direction of the Inland Revenue Commissioners in that behalf, they are entitled to be allowed a deduction of 5042*l.* in respect of the remuneration of their managing directors. Whether they are right or not in that contention depends upon the question whether the Commissioners were bound to direct the allowance of the deduction in question. I now read the words in full which I only read shortly in the first instance. They are these: " unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct." That is to say, there are specified two conditions under which the Commissioners of Inland Revenue may otherwise direct. In the case of one of those two conditions, the existence of special circumstances, the discretion of the Inland Revenue Commissioners is clear, and in my opinion it is wrong to say that there are two discretions one upon the other: it is one discretion; they are to determine whether there exist special circumstances on which they think fit to give that direction. That is the one discretion which in that case they have to exercise.

If that be so, and if they have that discretion in that case, it seems to me impossible, on the true construction of the section, to give a different meaning to the words " otherwise direct " in reference to the second of the two conditions. I see no way out of the difficulty that if we are to read this clause as the appellants would have us read it we must read it as if it were as follows: " unless the Commissioners, owing to any special circumstances, otherwise direct, or to the fact that the remuneration of any managers or directors depends on the profits of the trade or business."

For these reasons I think that the judgment of the Court below is right, that the Commissioners were not bound to allow the sum of 5042*l.* to be deducted, and that the appeal fails.

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SCRUTTON L.J. I have come to the same conclusion. In my view the interesting arguments to which we have listened would have been very relevant if addressed to the Houses of Parliament when they were considering the language in which they should express clause 5 in the schedule, but now that Parliament has chosen the words which are used in clause 5 of the schedule those arguments appear to me, with great respect to the learned counsel who used them, quite irrelevant, and but for the fact that I have heard the question argued, I should have thought that it was impossible to argue it.

Appeal dismissed.

Solicitors for appellants: *Deacon & Co.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

G. A. S.

1917
Dec. 3.

DANIEL *v.* ROGERS.

FANTINI, CLAIMANT.

Name—Business Name—Failure to register—Right to enforce Business Contract—Registration of Business Names Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 58), *ss.* 1, 3; *s.* 8, *sub-s.* 1.

Sect. 8, sub-s. 1, of the Registration of Business Names Act, 1916, provides that where a person who is required to be registered under that Act makes default in so doing "the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise."

By an assignment dated January 9, 1917, the claimant, who carried on business in a name other than her true name but was not registered under the Registration of Business Names Act, 1916, purchased the goodwill of the business and stock-in-trade of one R., and thereupon entered into occupation of the premises where R. had carried on business. Till a few weeks before June 12, 1917, the name of R. continued to appear over the premises, although in fact his connection therewith ceased in January. On June 12 the stock-in-trade so purchased was taken in execution at the instance of a judgment creditor of R., and, being claimed by the claimant, an interpleader issue was tried in which the claimant

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produced the assignment of January 9. It was contended by the execution creditor that the claimant was precluded by s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, from enforcing any right to the goods. The county court judge gave judgment for the claimant:—

Held, that s. 8, sub-s. 1, of the Act did not preclude the claimant from enforcing her right to the goods, for, although her right thereto was originally derived from the assignment of January 9, 1917, her right at the time of the claim rested on her common law title by possession and did not arise under or out of the assignment.

APPEAL from Brompton County Court.

The plaintiff, Daniel, obtained judgment on January 31, 1917, against one Rogers, who carried on business as a ladies' costume maker at 955, Fulham Road, and on June 12, 1917, certain goods at that address were taken in execution under the judgment. These goods were claimed by Miss Fantini as being her property. It appeared that by an assignment dated January 9, 1917, Rogers sold to Miss Fantini the goodwill and stock-in-trade (the goods actually seized) of the business at 955, Fulham Road. On January 17, 1917, Miss Fantini, who had carried on a similar business as Laurette at another address, took possession of the premises at 955, Fulham Road and was carrying on the business there when the execution was levied, and she continued to use the name Laurette on her invoices. Till about three weeks before the date of the execution the name Rogers & Co. was over the premises, but it was then removed, and no name was put up in its place. Rogers's connection with the business in fact ceased in January. Miss Fantini, who had not registered herself under the Registration of Business Names Act, 1916 (1), having claimed the goods, interpleader proceedings

(1) Registration of Business Names Act, 1916, s. 1: "Subject to the provisions of this Act—

. . . . . .

"(*b*) Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . . shall be registered in the manner directed by this Act . . . ."

Sect. 3 prescribes the particulars to be furnished for registration.

Sect. 7 imposes a penalty upon any person required to be registered who makes default in so doing.

Sect. 8, sub-s. 1: "Where any firm or person by this Act re-

followed. In those proceedings Miss Fantini gave evidence as to the purchase of the goodwill and stock-in-trade from Rogers, and she produced the assignment of January 9, 1917. The execution creditor contended, inter alia, that as the claimant was not registered under the Act of 1916 she was precluded by s. 8, sub-s. 1, of that Act from enforcing any right to the goods.

The county court judge gave judgment for the claimant. In his notes he said "I find that there was a genuine sale followed by actual and not nominal possession taken by claimant before the execution was levied."

The execution creditor appealed.

Coumbe, for the execution creditor. The claimant having made default in registering under the Registration of Business Names Act, 1916, is precluded by s. 8, sub-s. 1, of that Act from enforcing any right to the goods. She appeared in the interpleader proceedings and based her title on the assignment of January 9, 1917; she was thus seeking to enforce rights "under or arising out of" the contract.

A. H. Woolf, for the claimant. Sect. 8, sub-s. 1, of the Act, when it says that the rights of a person in default under the Act "shall not be enforceable by action or other legal proceeding," means enforceable against the other party to the contract.

[SHEARMAN J. The section does not say so. It provides that the rights of the defaulter "under or arising out of any contract" shall not be enforceable. Clause (*b*) of the proviso to the section further

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quired to furnish a statement of particulars . . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise:

Provided always as follows:—

"(*a*) The defaulter may apply to the court for relief against the disability, imposed by this section and the court . . . . may grant such relief" on certain conditions.

"(*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid . . . ."

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refers to "the rights of any other parties"; that must refer to rights, whatever they may be, of third parties.]

In any view the claimant is not seeking to enforce rights under the assignment as she had a property in the goods by possession.

Coumbe in reply. The right which the claimant seeks to establish, if it does not arise "under" the contract, clearly arises out of it, and the case falls within s. 8, sub-s. 1.

LAWRENCE J. This is an appeal from a decision in an interpleader issue in which the claimant, Miss Fantini, claimed to be entitled to the goods seized in execution by Daniel, the execution creditor. The judgment was obtained on January 31 and the levy in question was made on June 12. The county court judge has found that the claimant had been in possession, not nominal, but actual, before the execution was levied. The question, therefore, arose whether that possession was good against the execution creditor and for the purpose of fortifying her statement that she was the owner of the goods and in possession of them she produced an assignment to her dated January 9. On January 17 Miss Fantini took possession. She gave a cheque for 50*l.* in payment of the balance on the accounts between them and that was paid on January 23. On January 31 Daniel obtained judgment against Rogers, the vendor to Miss Fantini, who had carried on business at these premises, 955, Fulham Road. The name of Rogers & Co. remained over the shop till three weeks before June 12, the date of the execution; it was then removed, and Rogers & Co. thereupon ceased to have any ostensible connection with the business. Mr. Coumbe, on behalf of the execution creditor, says that as Miss Fantini had not registered herself under s. 1 of the Registration of Business Names Act, 1916, she comes under s. 8, sub-s. 1, of that Act and cannot enforce her right to the goods. That is the question we have to decide, and I have come to the conclusion that Mr. Coumbe's argument cannot succeed. Miss Fantini is not claiming to enforce rights arising out of or under that contract. She is saying that the goods are her goods, that she was in possession of them, and that the seizure was wrongful because the goods were hers. She is right if she is not enforcing rights under or arising out of the contract. It is true that by way of historical narrative

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Lawrence J.

and to show the bona fides of the transaction she produced the assignment and the other facts which I have mentioned were proved, but she was not seeking to enforce rights arising under or out of the contract. Those words in s. 8, sub-s. 1, must receive some limitation. It is true that originally the claimant's right to the goods arose out of the assignment, but when that right to the goods was confirmed by possession she then got a common law title to them and it was not necessary for her to enforce the contract at all. The section only strikes at suits arising under or out of a contract. The county court judge's finding, amply supported as it was by the evidence, has, in my opinion, determined the point against Mr. Coumbe's argument. Therefore, while I am not disposed to cut down the words of s. 8, sub-s. 1, of the Act, we must construe it reasonably and not give it so wide an effect as to destroy rights of property long after possession has been taken. The statute, which embodies very sound provisions, was not intended to have that wide effect. The appeal, therefore, fails.

SHEARMAN J. I am of the same opinion. The real point is as to the proper construction of s. 8, sub-s. 1, of the Act of 1916. The case is an important one, and I have had some searchings as to its proper decision having regard to the very wide words of the section. [His Lordship stated the facts and continued :] Does the fact that the claimant produced the assignment to her of the goodwill and stock-in-trade of the business bring the case within s. 8, sub-s. 1, of the Act ? The sub-section says this : " Where any firm or person by this Act required to furnish a statement of particulars . . . . shall have made default in so doing "—the claimant had not furnished particulars and was therefore a defaulter —" then the rights of that defaulter under or arising out of any contract "—it does not merely say " rights under any contract," but " under or arising out of any contract "—" made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise." That language is very wide, and the question is whether the property which the claimant asserted in these

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Shearman J.

proceedings is to be regarded as a right arising under or out of the contract. I do not think the words can be extended to the width contended for by Mr. Coumbe. As the claimant had been in possession of the stock-in-trade for some months before the execution she could have claimed the goods without producing the assignment at all, and the fact that to show that her possession was bona fide she produced the assignment did not bring her within the Act. I cannot stretch the words to include such a case as this. She was not enforcing a right "under or arising out of any contract," words which must mean springing immediately out of the contract, and at the particular moment the claimant's right did not arise out of the contract. Her right rested originally on the contract, but at the time in question it rested on her common law right of property. I have no desire to limit the words of the Act and I cannot agree with Mr. Woolf's contention that s. 8 prohibits only the enforcing of rights against the other party to the contract. But for the reasons I have given I do not think this case comes within the section.

Appeal dismissed.

Solicitor for execution creditor: *G. Gordon Coxwell.*
Solicitors for claimant: *Merton & Steel.*

J. S. H.

KINNELL & CO. *v.* HARDING, WACE & CO.

1917
Dec. 12.

County Court—Company Plaintiff—Præcipe for Summons—Lodging of by Agent of Company not a Solicitor—County Court Rules, Order LIV., *r.* 1.

A plaintiff in the county court may lawfully employ an agent, who is not a solicitor, to initiate proceedings and file the necessary præcipe on his behalf.

APPEAL from Southwark County Court.

The plaintiffs are a company registered under the Companies Acts, and the defendants were indebted to them. The plaintiffs took out a default summons under s. 86 of the County Courts Act, 1888. They employed, for the purpose of filing the necessary præcipe and the affidavit which has to accompany the application for such a summons, one of their own clerks instead of a solicitor. The defendants gave notice of intention to defend, and a day was fixed for the hearing. The defendants, however, did not attend, and judgment was entered against them. Subsequently the defendants, on discovering that the plaintiffs had commenced the action through an agent who was not a solicitor, applied to the county court judge to set the judgment aside on the ground that the summons had been irregularly issued. The county court judge held that it had long been the practice of county courts to allow parties to initiate proceedings by agents who were not solicitors, and following that practice he dismissed the defendants' application.

The defendants appealed.

Wallington, for the appellants. Where a plaintiff in the county court desires to issue a default summons he has to file a præcipe in Form 7 of the Forms in the County Court Rules, containing the particulars of his claim, his name in full and his address, and if a solicitor is employed the solicitor's name and address. He has also to file an affidavit of the debt in Form 11. The filing of such præcipe and affidavit are steps in the action which can only be taken by the party himself in person or by his solicitor. They cannot be taken by an agent, who is not a solicitor. By Order LIV., r. 1, of the County Court Rules, "Where by these rules any act may be done by any

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party, such act may be done either in person or by his solicitor, or by an agent, where it can be legally done by an agent." But such an act as filing the præcipe or affidavit cannot be legally done by an agent. In *In re Ainsworth* (1) it was held that an unqualified person who, as agent for the defendant in an action in the High Court, gives notice of appearance to the writ, is acting as a solicitor in contravention of s. 2 of the Solicitors Act, 1843. And what applies to appearance must equally apply to taking out a summons. There can be no distinction in this respect between proceedings in the High Court and the county court. Nor can it make any difference in this respect that the plaintiff is an incorporated company which cannot attend in person. That is a disadvantage under which a corporate body labours, but affords no reason why it should be represented by an agent by whom an individual plaintiff could not be represented. In *In re London County Council and London Tramways Co.* (2) Cave and Wright JJ. refused to allow the chairman of a company to move on its behalf to set aside an award. And the same thing was held by Bray J. in *Scriven* v. *Jescott* (3) with regard to a managing director. It is true that by s. 72 of the County Courts Act, 1888, any person may be allowed by the judge to appear and address the Court on behalf of a party, but that does not apply to the filing of a præcipe.

Hinde, for the respondents. The practice of allowing unqualified agents to take out summonses on behalf of plaintiffs has existed for many years in all the metropolitan county courts. The cases cited by the appellants are all cases in the High Court. But the county court stands on a different footing. It is the poor man's court. There is nothing in the County Court Rules which compels a plaintiff to employ a solicitor to take the initial step. It would be particularly unjust in the case of a company if it were so, for if they had a debt owing to them of 10*s.* they could not bring any action to recover it. For where the amount recovered is under 2*l.* there is no provision for any costs as between party and party except in respect of the summons and hearing fee. Consequently if they had to employ a solicitor the amount recovered would be exceeded by the cost of recovering it.

(1) [1905] 2 K. B. 103. (2) (1897) 13 Times L. R. 2[illegible]1.
(3) (1908) 53 Sol. J. 101.

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Wallington in reply. The High Court practice on the question in issue is clear, and the county court practice ought in this matter to follow that of the High Court. By s. 164 of the County Courts Act, 1888: "In any case not expressly by this Act or in pursuance thereof provided for the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters."

Cur. adv. vult.

Dec. 12. The judgment of the COURT (Lawrence and Shearman JJ.) was read by

LAWRENCE J. This case raises the important question whether a limited company or other corporation can be represented in the county court by a person who is not a solicitor. It is clear that this cannot be done in the High Court either by a corporation or a natural person: *In re Ainsworth* (1); but county courts are not now governed by the same rules. There was a time when it was necessary for every one to employ a solicitor in all courts of record: see 2 Geo. 2, c. 23, and 30 Geo. 2, c. 19, s. 7. This practice has long been altered, and we are told by the learned county court judge that it is now the practice to allow steps to be taken in actions by agents who are not on the roll of solicitors, and this whether the principal is a limited company or a natural person. This practice appears to me to be in accordance with the County Courts Act, 1888, and the rules made thereunder. Sect. 72 provides that by the leave of the judge any person allowed by the judge may appear and address the Court instead of the party himself. Order LIV., r. 1, provides that "Where by these rules any act may be done by any party, such act may be done either in person, or by his solicitor, or by an agent where it can be legally done by an agent." By the interpretation section "person" includes "a body corporate," so this rule applies to a limited company. The only limitation therefore is contained in the words "where it can be legally done by an agent." It does not seem to me that these words can have the effect of making it necessary that all acts done for a limited company should be done by a solicitor. A solicitor is only an agent having special qualifications. A corporation is a body

(1) [1905] 2 K. B. 103.

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that can do no act except by an agent. I can see no reason for suggesting that a corporation must act by that specially qualified class of agents called solicitors while other persons are not so restricted. Sect. 72 gives power to the judge to prescribe regulations from time to time for the orderly transaction of the business of the Court, and so long as such regulations are not violated I think the company may act by any agent it may choose to employ.

Appeal dismissed.

Solicitors for appellants: *Cohn & Co.*
Solicitors for respondents: *Morton & Patterson.*

J. F. C.

C. A.
1917
July 26 27; *Nov.* 6.

[IN THE COURT OF APPEAL.]

TREBECK *v.* CROUDACE.

[1916 T. 1300.]

False Imprisonment—Misdemeanour—Arrest on Suspicion—Charge of being Drunk while in Charge, on Highway, of Taxicab—Honest and reasonable Belief in Charge—Mistake—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.

By s. 12 of the Licensing Act, 1872, "Every person . . . . who is drunk while in charge on any highway . . . . of any carriage . . . . may be apprehended, and shall be liable to a penalty . . . .":—

Held, that the power to apprehend conferred by the section authorized the apprehension of persons honestly and upon reasonable grounds believed to be committing the offence at the time when they were arrested.

The defendant, a sergeant of police, took the plaintiff, a taxicab-driver, into custody on a charge of being drunk while in charge on a highway of a taxicab. The plaintiff denied that he was drunk, and the magistrates before whom he subsequently appeared dismissed the case. The plaintiff then brought an action claiming (inter alia) damages for false imprisonment. The jury found that the defendant honestly believed at the time he arrested the plaintiff that the plaintiff was drunk. On this finding Bailhache J. entered judgment for the defendant.

On appeal:—

Held, that judgment was rightly entered for the defendant.

APPEAL and CROSS-APPEAL from the verdict and judgment at trial before Bailhache J. and a common jury.

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TREBECK v. CROUDACE.

The action was brought by Edward Herbert Trebeck, a taxicab-driver, against Benjamin Croudace, a sergeant in the Metropolitan Police Force, for damages for false imprisonment and malicious prosecution.

The following statement of facts is taken from the judgment of Swinfen Eady L.J. :—" On August 5, 1916, between 8 and 8.15 P.M., the plaintiff, who had just taken out a taxicab at Shepherd's Bush, was engaged by Lieutenant Tate to drive him and his wife to Uxbridge, and the fare was agreed beforehand at 17*s.* 6*d.* The engine was not pulling well, and three times on the way to Uxbridge the plaintiff had to stop, descend from the cab, and make some adjustment to improve the going of the cab. In consequence they arrived at Uxbridge later than had been anticipated. Lieutenant Tate, who had to rejoin his regiment at Denham, was afraid that he had missed at Uxbridge the train to Denham, and asked the plaintiff to drive on from Uxbridge to the camp at Denham. The plaintiff says he asked that the fare might be increased to 22*s.* Lieutenant Tate says that he asked for 25*s.*, being an increase of 7*s.* 6*d.* for the three miles. Ultimately the plaintiff declined to go on to Denham. He says that the allowance of petrol was only two gallons per man, and he was afraid of running short, and being stranded and unable to get home. It is disputed, however, whether the subject of petrol was mentioned. An altercation arose. Lieutenant Tate appealed to a policeman, and this policeman called the sergeant on duty, who was the defendant. The sergeant considered that the plaintiff was the worse for drink and took him to the station. Lieutenant Tate was able to catch the train for Denham as it was late. Mrs. Tate returned to town from Uxbridge by tram. The plaintiff arrived at the police station about 9.20 P.M. ; the divisional surgeon was sent for and he arrived at about 9.40 P.M. He applied to the plaintiff the usual tests for drunkenness, and then signed his report, which stated that the plaintiff 'smells of drink, but is not now drunk.'

"The defendant signed the charge-sheet, and the sergeant on duty at the station accepted the charge. Later that night the plaintiff's employer came to Uxbridge, and attended at the police station and bailed out the plaintiff.

"The plaintiff's evidence was that he had been a teetotaller since

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the previous February, when he had had a little ' jollification ' on the occasion of his birthday and had had some whisky ; that he then turned over a new leaf again, and had not partaken of any intoxicating liquor until the evening in question, when before starting he had only drunk a portion of some cider with which he had been supplied, as the house had no ' tonic water ' for which he had called.

" On Monday, August 7, the plaintiff appeared before the magistrates, and at his request the case was adjourned for a week, and, on the day of the adjournment, the case was dismissed."

Thereupon the plaintiff brought the present action against the defendant, which was tried before Bailhache J. on March 27, 28, 1917.

At the trial the judge left the following questions to the jury :—

" (1.) Did the defendant honestly believe at the time he arrested the plaintiff that the plaintiff was drunk ? Answer : Yes. (2.) Did the defendant honestly believe at the time he signed the charge-sheet that the plaintiff was drunk ? Answer : No. (3.) Damages (if any) for false imprisonment ? Answer : Four guineas. (4.) Damages (if any) for malicious prosecution ? Answer : Twenty guineas."

On these findings Bailhache J. gave judgment for the defendant on the claim for false imprisonment and for the plaintiff on the claim for malicious prosecution ; for which the jury assessed the damages at twenty guineas.

The defendant appealed against the verdict and judgment on the claim for malicious prosecution, and the plaintiff cross-appealed against so much of the judgment as ordered that judgment should be entered for the defendant on the claim for false imprisonment.

The plaintiff contended that on the claim for false imprisonment judgment should be entered for him for four guineas, the amount of damages provisionally assessed by the jury. The defendant contended that on the claim for malicious prosecution judgment should be entered for him as well as on the claim for false imprisonment.

The case is reportable only on the question of false imprisonment, the Court of Appeal holding on the claim for malicious prosecution that there was no evidence of malice to support it. The arguments and the parts of the judgments dealing with the question of malicious prosecution are accordingly omitted.

The appeal was heard on July 26, 27, 1917.

A. Powell, K.C., and *Martin O'Connor*, for the plaintiff. The judge was wrong in holding that a constable is entitled without a warrant to arrest a man in charge of a taxicab on suspicion of being drunk. In so holding he was attempting to legislate. At common law there is no power to arrest persons guilty or suspected of misdemeanours, except in cases of actual breach of the peace either by an affray or by violence to an individual: Stephen's History of the Criminal Law, vol. 1, p. 193; see also Howard Vincent's Police Code, pp. 12, 13, *Griffin* v. *Coleman* (1), and *Codd* v. *Cabe*. (2)

[BANKES L.J. referred to the judgment of Byles J. in *Downing* v. *Capel*. (3)]

That case turned entirely upon the question of notice of action.

[BANKES L.J. The man there had committed no offence at all.]

It is not sufficient that a constable should believe in the existence of a certain state of facts; the state of facts must exist.

[BANKES L.J. referred to *Chamberlain* v. *King*. (4)]

In that case it was held that a defendant in an action for false imprisonment was entitled to notice of action under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 113, if he honestly believed in the existence of a state of things which, if it had existed, would have justified his doing the acts complained of under the statute. The whole question there was whether the defendant was entitled to notice of action. It did not deal with the question of his liability. To make the question in the present case turn on whether or not the defendant honestly and upon reasonable grounds for suspicion arrested the plaintiff would be to place a misdemeanour in the same position as a felony: *Hogg* v. *Ward*. (5) Although a constable has a right to arrest on suspicion for a felony, yet if he arrests without reasonable cause he is liable for damages for false imprisonment.

[BANKES L.J. referred to s. 64 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47).]

That section only refers to "loose and disorderly persons" and does not cover this case. If the Legislature had intended that a constable should have power to arrest on suspicion it would have

(1) (1859) 4 H. & N. 265.
(2) (1876) 1 Ex. D. 352.
(3) (1867) L. R. 2 C. P. 461, 464.
(4) (1871) L. R. 6 C. P. 474, 478.
(5) (1858) 3 H. & N. 417.

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said so. The power given by s. 12 of the Licensing Act, 1872 (1), is to arrest a person "who is drunk" while in charge on any highway of any carriage. It would be a distorted construction of the section to treat it as authorizing the arrest of a person who appears to the constable to be drunk. If the person arrested is not in fact drunk the right of the constable to arrest him is gone and the constable is liable for damages for false imprisonment. [They also referred to the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), and the Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1.

Inskip, K.C., and *Hon. M. M. Macnaghten*, for the defendant. In Hawkins' Pleas of the Crown, bk. ii., c. 12, it is laid down (s. 19) that "any one may lawfully lay hold on another, whom he shall see upon the point of committing a treason or felony, or doing any act which would manifestly endanger the life of another," and (s. 20) "that the arrest of any other offenders by private persons, for offences in like manner scandalous and prejudicial to the public, may be justified." Those sections give a broad ground on which a constable may arrest.

In the case of a felony, if a constable has reasonable cause for believing that a felony has been committed and arrests he is protected. A constable may arrest without warrant a man if a breach of the peace is apprehended. The arrest in the present case might be justified on that ground. It is submitted, however, that the effect of s. 12 of the Licensing Act, 1872, has put the statutory power of arrest thereby given on the same footing as the power to arrest

(1) Licensing Act, 1872, s. 12: "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings, and on a second conviction within a period of twelve months shall be liable to a penalty not exceeding twenty shillings, and on a third or subsequent conviction within such period of twelve months be liable to a penalty not exceeding forty shillings.

"Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or in the discretion of the Court to imprisonment with or without hard labour for any term not exceeding one month."

for a felony, and that the defendant had therefore power to arrest the plaintiff without warrant by reason of the honest and reasonabl suspicion he entertained that the plaintiff was drunk.

A. Powell, K.C., replied.

Cur. adv. vult.

1917. Nov. 6. The following judgments were read :—

SWINFEN EADY L.J. This action was to recover damages for false imprisonment and malicious prosecution, and was tried before Bailhache J. and a common jury. He left certain questions to the jury, and, having regard to their answers, he directed judgment for the defendant upon the claim for false imprisonment, and for the plaintiff for 21*l.* damages on the claim for malicious prosecution. Each side appeals. The plaintiff contends that, on the claim for false imprisonment, judgment should be entered for him for four guineas, being the amount of damages provisionally assessed by the jury. The defendant contends that on the claim for malicious prosecution judgment should be entered for him as well as on the claim for false imprisonment. The facts out of which the action arises are as follows. [His Lordship stated the facts as above set out, and after dealing with the defendant's appeal against the judgment for malicious prosecution, and holding that there was no evidence of malice or want of reasonable and probable cause to support the claim and that the judgment should be reversed and judgment entered for the defendant, he continued :]

Upon the cross-appeal of the plaintiff on the claim for false imprisonment we start with a finding by the jury that the defendant honestly believed when he arrested the plaintiff that he was drunk. This raises the question what is the duty of a police officer when he sees a man in a highway in charge of a motor car or taxicab whom has reason to believe, and does honestly believe, to be drunk ? The plaintiff relies upon the fact that the offence of being drunk while in charge of a motor car on a highway is a misdemeanour only ; and he contends that a person arresting without warrant for a misdemeanour, in cases where no statutory provision applies, does so at his peril ; and that, if it should ultimately be determined that no offence has been committed, the person arresting has no defence to an action for false imprisonment.

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At common law a private person may arrest where a breach of the peace is being actually committed or is apprehended, although "no private person can of his own authority arrest another for a bare breach of the peace after it is over": Hawkins' Pleas of the Crown, bk. ii., c. 12, s. 20; see also Hale's Pleas of the Crown, vol. 2, p. 78. But no defence of an apprehended breach of the peace was set up at the trial. In cases of misdemeanour, other than those which amount to a breach of the peace, in the absence of statutory authority there is no power to arrest without a warrant. The defendant, however, in the present case justifies the arrest under the provisions of s. 12 of the Licensing Act, 1872, which provides as follows: "Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine, or who is drunk when in possession of any loaded firearms, may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or in the discretion of the Court to imprisonment with or without hard labour for any term not exceeding one month." A light locomotive—e.g., a motor car or taxicab—is to be deemed a "carriage" within the meaning of this Act: see Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 1, sub-s. 1 (*b*). Now, what is the duty of a police officer when he sees a man whom he believes to be drunk in charge of a motor vehicle on a highway? Manifestly to arrest him at once, primarily in order to prevent the man from injuring himself or any one else; and, secondly, to procure him to be punished for his offence. The statute confers a power of immediate arrest, and obviously intends that it should be acted upon at once, and without waiting to obtain a warrant. In the case of the offence of being drunk in a highway and in possession of a loaded firearm usually a police officer would be unable to say whether the firearm was loaded or not without taking it into his possession and examining it. Is it to be said that if he sees a drunken man in a street in possession of a gun and brandishing it about he must abstain from intervening unless he is sure that the gun is loaded, or otherwise risk an action being brought against him? Is he to wait until the drunken man shows that the gun was loaded by discharging it? And then perhaps it may no longer be a loaded firearm.

The nature of the offence mentioned in s. 12 shows, in my opinion, that the Legislature intended the authority to apprehend to apply where the circumstances are such as to enable an honest belief upon reasonable grounds to exist that the offence is being committed by the person being apprehended. The cases mentioned in the section are all matters where it is reasonable to apprehend danger to life or limb of innocent persons unless the man who appears to be drunk be immediately apprehended.

It was urged that there are numerous statutes under which powers are conferred upon police officers to arrest persons "reasonably suspected" of having committed various offences, and, as those words are absent in the present case, the officer arresting acts at his peril and is not protected by the statute if it should be decided that the offence has not in fact been committed. The language, however, of statutes conferring power to arrest for different offences varies very much. Sometimes it is to arrest a person "found committing" or "found offending"; sometimes, as in the Pawnbrokers Act, it is "reasonably suspecting"; sometimes it is to "arrest"; sometimes "apprehend"; sometimes "take into custody without warrant" (Children Act, 1908 (8 Edw. 7, c. 67)).

In my judgment the power to apprehend, conferred by s. 12 of the Act of 1872, extends to authorize apprehension of persons honestly and upon reasonable grounds believed to be committing the offence at the time when they are arrested. The nature of the offences specified requires this construction, and the subject has a real protection against undue interference with liberty in being able to require the verdict of a jury to be taken upon the question of honest belief. The cross-appeal of the plaintiff asking for judgment on the finding of the jury fails and should be dismissed.

BANKES L.J. In these cross-appeals the defendant claims to have judgment entered for him upon the issue of malicious prosecution upon the ground that there was no evidence of want of reasonable and probable cause or of malice; and the plaintiff claims to have judgment entered for him upon the issue of false imprisonment upon the ground that there was no evidence justifying or excusing his arrest.

The defendant's appeal raises a simple question upon which I

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entertain no doubt. [His Lordship then dealt with the question, and held that the defendant was entitled to succeed on his appeal and to have judgment upon the issue of malicious prosecution entered for him. He continued:] The plaintiff's cross-appeal raises a question of very considerable public importance, and one upon which it is curious that there is no authority. The statute under which the defendant claimed to have acted in arresting the plaintiff is s. 12 of the Licensing Act, 1872, the material provision of which is in the following words: "Every person who is drunk while in charge on any highway of any carriage may be apprehended."

The charge against the plaintiff was dismissed by the magistrates before whom the case came. In the present action that fact did not prevent the defendant from justifying the arrest upon the ground that the plaintiff was in fact drunk when he was arrested. The defendant, however, did not raise that point on his pleading or at the trial; nor did he either on his pleading, or at the trial, raise the point that he was justified at common law in arresting the plaintiff upon the ground that he reasonably anticipated a breach of the peace. His one and only defence was, to use the language of his pleading, that the plaintiff "appeared to the defendant to be drunk."

From the very nature of things the arrest of a drunken person in the street may very frequently be justified on the ground of an anticipated breach of the peace, and particularly so when the alleged offender is in charge either of a loaded gun, or of a motor vehicle, both very dangerous instruments from the point of view of the public safety when in the hands of a drunken person. In my opinion the defendant in the present case is not entitled in this Court to rely upon a defence which was neither pleaded nor raised at the trial. The single point therefore remains whether the language of the statute authorizes the arrest of a person upon suspicion of having committed the offence where the suspicion is honestly entertained on reasonable grounds by the person making the apprehension. That the defendant would have had no defence to the action at common law is quite clear. Not only has a constable no power at common law of arresting a person without warrant on suspicion of having committed a misdemeanour, but he has no power of arresting

without warrant in any case of misdemeanour except when a breach of the peace had been committed in his presence, or when there was reasonable ground for supposing that a breach of the peace was about to be committed or renewed in his presence. It was in aid of the common law on this point, and to supplement the powers of constables and others, that the Legislature has from time to time given authority for arrest without warrant in a number of cases of misdemeanour. Though the language in which this authority has been conferred varies greatly in different statutes, and in different sections of the same statute, the object of the Legislature must have been the same, namely, to provide for cases where, in the interests of public safety, or where danger to life or limb or property is threatened, prompt action is called for, and action which must of necessity be founded on the circumstances of the moment, and mainly probably on such information as the senses of a police constable, his sight and hearing, convey to him. This authority to arrest without warrant which is conferred by statute is in all cases practically the initial step to some form of judicial or quasi-judicial proceeding. Sect. 38 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and s. 69 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), both provide that the person taken into custody must be forthwith dealt with so as to enable him to be brought at once before a magistrate, or have an opportunity of being discharged or of giving bail for his appearance. These provisions reproduce, with such alterations as are necessary, the provisions of the common law applicable to arrests for breach of the peace, and which Parke B. in *Timothy* v. *Simpson* (1) describes as arrests "not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as upon a review of all the circumstances, he might think fit." Under these circumstances the question which has to be decided is whether a constable who arrests a person without warrant must prove in order to justify his action that the person arrested was actually guilty of the offence, or whether it is sufficient, as in a case of an action for malicious prosecution, to show that he acted without malice and with reasonable and probable cause. Who is it that the Legislature intends to be the judge of

(1) (1835) 1 Cr. M. & R. 757, 763.

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whether the circumstances are such as to justify or to call for an arrest? Surely it must be the person who is called upon to act upon such information as is available to him at the moment, and not some judge or jury at some later time upon materials of which the person making the arrest had not only no knowledge but no means of knowledge. In many instances in which the power of arrest is given to constables by statute the language used gives an indication as to the intention of the Legislature. In many cases the expression used in relation to the offender is "found offending" or "who shall commit in view of the constable." Language such as this appears to indicate pretty plainly that the person intended by the Legislature to be the judge of whether the occasion warrants the arrest is the constable. If that is so, the honest belief of a constable on reasonable grounds is a sufficient justification for his action. Sect. 64 of the Metropolitan Police Act, 1839, is, I think, worth referring to. It provides that "it shall be lawful for any constable . . . . to take into custody, without a warrant, all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanour, or breach of the peace." If the view contended for by the plaintiff is correct a constable could under this section justify the arrest of a disorderly person upon reasonable suspicion of having committed or being about to commit a misdemeanour, but would be unable to justify the arrest of such a person who he had the very best reason for knowing was disturbing the public peace because he had both seen and heard him in the act, if a jury either on fresh materials altogether or on the same materials as he had himself, at some later period took a different view. Sect. 12 of the Licensing Act, 1872, contains no such language as is used in many of the statutes authorizing arrest without warrant, and to which I have referred; but I cannot think that any distinction as to the powers intended to be conferred can have been contemplated, and, in my opinion, the character of the various offences enumerated in the section sufficiently indicates that the Legislature, in allowing and encouraging prompt action in the public interest, did not intend to require a higher justification for an arrest than honest belief on reasonable grounds on the part of the person making the arrest. Such a construction no doubt places

the individual to some extent at the mercy of the blundering constable, but on the other hand individual interests have often to give way to the public good. The person wrongfully arrested is in no worse case than he who is wrongfully prosecuted. In each case he has his remedy if the law be set in motion maliciously and without reasonable and probable cause. In my opinion the decision of the learned judge was right and the cross-appeal must be dismissed with costs.

WARRINGTON L.J. This action is founded on two quite independent causes of action—(1.) false imprisonment, and (2.) malicious prosecution. After a trial before Bailhache J. with a common jury judgment was pronounced for the defendant on the first of the two causes of action, and for the plaintiff on the second with 21*l.* damages, the amount assessed by the jury. The defendant appeals from the judgment on the second of the two causes of action and the plaintiff has given a cross-notice of appeal from the judgment against him on the first.

I need not repeat the statement of the facts leading up to the arrest of the plaintiff. [His Lordship then stated the subsequent facts and dealt with the question of malicious prosecution, and held that judgment ought to have been, and ought now to be, entered for the defendant on the claim for damages for malicious prosecution. He continued :]

I now turn to the claim founded on the charge of false imprisonment. The plaintiff was arrested without warrant, and the question is, was such arrest justified ? It might be justified either at common law or by statute. The only rule of common law which would justify it would be that which permits arrest without warrant where a breach of the peace is anticipated. I am inclined to think the arrest might have been justified on this ground, but I need not further discuss it, inasmuch as no such case was alleged on the pleadings or raised at the trial or in this Court. The defendant sought to justify the arrest as having been effected under statutory authority. The statutory provision relied on is s. 12 of the Licensing Act, 1872. [His Lordship read the section, and continued :] It is to be observed that in each of the three cases mentioned in the second part of the section the apprehension of the person in question

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must be immediate if it is to serve the purpose for which it is obviously intended, namely, to prevent disorder or injury to the person in question himself or to others. It would in my opinion reduce the section to an absurdity if a constable under such circumstances were to be liable to an action for false imprisonment if, though he honestly believed the man he apprehends to be drunk, the tribunal afterwards on evidence which could not be before the constable at the time comes to the conclusion that he was not. To take another example from the section: if the plaintiff is right, the constable could not properly arrest a drunken man in possession of a firearm unless he first satisfies himself that it is loaded, a thing which in many cases could not be done without taking the gun from the drunken man with grave risk of disaster in the process. It is to be observed, moreover, that the section creates two classes of offences —first, that of being drunk in a highway or other public place, in which case there is no power to apprehend, and, secondly, that of being drunk under the special circumstances enumerated, all of which, as I have already said, may result in a breach of the peace or danger to the man himself or others. This, to my mind, is a further indication that the Legislature intended in such cases that the man should at once be apprehended in order to prevent serious consequences.

In my judgment, considering the obvious purpose of the section, it ought to be construed so as to justify apprehension on reasonable suspicion of drunkenness. The conclusion I come to, therefore, is that the judgment so far as it was in the defendant's favour should be affirmed and so far as it was in the plaintiff's favour should be reversed, and that judgment should have been entered and should now be entered for the defendant on both causes of action.

SWINFEN EADY L.J. The form of the order will be that, on the defendant's appeal on the claim for malicious prosecution, the appeal be allowed with costs, and on the plaintiff's cross-appeal that it be dismissed with costs; then that judgment be entered in the action for the defendant with costs.

Solicitors: *Wontner & Sons; C. F. Appleton.*

W. I. C.

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[1916 U. 723.]

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[1917 U. 6.]

Landlord and Tenant—Aircraft Risks—Covenant to insure against Loss or Damage by Fire—Policy to be effected in named Company—Usual Policy at Date of Lease—War Risks excepted—Admissibility of Evidence—Construction of Covenant.

In a lease granted in 1905 the lessee covenanted that he would insure and keep insured the demised premises against loss or damage by fire in the names of the lessor and lessee in the Imperial Insurance Company or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor. Through the agency of the lessor the premises were duly insured with the named company under a policy which excepted loss or damage occasioned by or happening through "invasion, foreign enemy, ... military or usurped power." This policy was accepted by the lessor as sufficient until July, 1915, when, in consequence of enemy air raids, he required the lessee to insure the premises also against loss or damage by fire occasioned by enemy aircraft in pursuance of his covenant. The lessee refused to remedy this alleged breach and the lessor commenced this action to recover possession:—

Held: (1.) that evidence was admissible to prove that the named companies had never insured against aircraft risks, and that their policies had always excepted the risks above mentioned;

(2.) that the covenant was to effect such a policy as was the usual policy of the companies in question at the date of the lease, or such a policy as might from time to time be usual during the currency of the lease; and

(3.) that there had been no breach of that covenant by the lessee.

Enlayde, Ld. v. *Roberts* [1917] 1 Ch. 109 distinguished.

Trial of actions before Roche J. without a jury.

The following statement of facts is taken from his Lordship's considered judgment:—"These actions were tried before me on October 30, 1917. They raise the same question upon facts which are in all material respects identical. The plaintiff, Mr. Upjohn, is the freeholder and lessor of properties in Riffel Road, Willesden Green. The defendant in the first action, Mr. Hitchens, is the

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lessor of No. 208, Riffel Road, and the defendant in the second action, Mr. Ford, is the lessee of No. 23 in the same road. Mr. Hitchens' lease is dated January 6, 1905. Mr. Ford's lease is dated May 11, 1905. Both leases are for a term of ninety-nine years. The actions were brought to recover possession of the premises the subject of the leases on the ground that the lessees had not complied with the lessees' covenants as to insurance contained in their respective leases and that the right of re-entry had accrued to the plaintiff. The defendants denied the breaches alleged.

"Each lease contained covenants by the lessee in the following terms: 'And also will at the like' (i.e., his own) 'expense insure and keep insured all erections and buildings on the said piece or parcel of ground hereby demised against loss and damage by fire in the names of the lessor and the lessee in the Imperial Insurance Company or in some other responsible office or offices in London or Westminster to be previously approved of in writing by the lessor in the sum of 500*l.* at the least and will on demand produce to the lessor the policy or policies of assurance and the receipt for the current year's premium and other sums payable in respect thereof and also will forthwith lay out all monies to be received by virtue of any such insurance in substantially repairing and reinstating the buildings which shall have been damaged or destroyed by fire with the approval and to the satisfaction of the surveyor for the time being of the lessor and if the same shall be insufficient then will at his own expense so repair and reinstate the same. . . . . And also will at the expiration or sooner determination of the said term deliver up the said premises with all additions and fixtures thereto in such good and substantial repair as aforesaid and in all respects in such state and condition as shall be consistent with a due performance of the covenants hereinbefore contained.' There was in each lease a proviso for re-entry 'if and whenever there shall be a breach of any of the covenants hereinbefore contained and on the part of the lessee to be observed and performed.'

"The Imperial Insurance Company mentioned in the leases had prior to the date of such leases become incorporated in the Alliance Assurance Company. The plaintiff is a solicitor, and his firm were agents of the Imperial Insurance Company and later of the Alliance Assurance Company, and through their agency fire policies in

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respect of the two houses in question were taken out in 1905 and through the same agency were annually renewed. Under each policy the lessor and lessee were the assured in the sum of 500*l.* against loss or damage by fire or lightning. On the back of each policy were conditions, twelve in number. Condition 4 provided, amongst other things, that 'this policy does not cover loss or damage occasioned by or happening through invasion, foreign enemy, ... military or usurped power.' On July 22, 1915, the plaintiff caused a letter to be written by his firm to each defendant in the following terms: 'Dear Sir,—You are probably aware that the Government has evolved a scheme for the insurance of property against aircraft and bombardment risks. The Alliance Assurance Company have agreed to act as agent for the Government in connection with such insurance. The sums to be insured should be the same as those for which the property is insured against fire. The rates for building rent and contents of private houses in which no trade or manufacture is carried on are as follows:' Then he sets out the rates. 'As the premises No. 23, Riffel Road, Willesden Green, in which you are interested, are insured with the Alliance Assurance Company, we will be glad to know if you would wish to insure the same property against the above risks or either we would suggest against aircraft only, which would only cost you 10*s.* If you will sign the enclosed form and return to us we will proceed at once. Yours faithfully, Morgan & Upjohn.' Correspondence and interviews followed, the effect of which was that the plaintiff insisted that the defendants were bound under their covenants to insure against loss or damage by fire occasioned by aircraft and to so insure in his name as well as their own and to produce the policies to him. The defendants took up the position that they were not so bound. The defendant Hitchens in fact from October, 1915, onwards insured himself under the Government scheme to the extent of 500*l.*, though part of this sum, namely, 150*l.*, was in respect of his furniture. The defendant Ford from October, 1915, onwards insured himself at Lloyd's to the extent of 500*l.* in respect of his house and 200*l.* in respect of his furniture against aircraft risks generally. Both these insurances were, of course, more extensive in their protection than a policy against fire caused by aircraft. In the case of both defendants the Alliance policies

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were either produced to the plaintiff or it was agreed that the production should be taken as waived. It was admitted by the defendants that their aircraft policies were not produced to the plaintiff, and that in any event they were not policies such as were required by their covenants if those covenants required further policies at all.

"In November, 1916, the plaintiff caused notices to be served upon the defendants pursuant to s. 14 of the Conveyancing and Law of Property Act, 1881, and such notices not having been complied with, these actions were brought."

At the trial the secretary of the Alliance Assurance Company was called by the defendants as a witness, and the effect of his evidence is stated in his Lordship's following judgment.

Lewis Thomas, K.C., and *A. H. H. Richardson*, for the plaintiff. This covenant is to insure and keep insured against loss or damage by fire. That is absolute and means insurance against fire from any cause, and the covenant is not satisfied by effecting the ordinary fire policy granted by insurance companies with the usual exceptions which would exclude aircraft risks. Evidence is not admissible on the question of the construction of this policy to show what was the usual policy at the date of the lease, but the covenant must be construed in its strict or primary sense: *Enlayde, Ld.* v. *Roberts*. (1) The acceptance of the existing policy was not a waiver by the plaintiff of any further policy such as is now required. What has not happened cannot be waived. The aircraft policy taken out by each defendant is not a performance of his covenant, because it is in his name alone and not in his and the plaintiff's joint names. The covenants in each lease have been broken and the plaintiff is entitled to re-enter.

Colam, K.C., and *Gervais Rentoul*, for the defendant in each action. The policy was obtained in each case through the agency of the plaintiff or his firm, and from 1905 up to the present dispute was accepted and regarded by him as sufficient. He cannot now be heard to say that the policy is insufficient and the covenant absolute and unconditional. *Enlayde, Ld.* v. *Roberts* (1) is not an authority in point. That was an action by a lessee on his lessor's

(1) [1917] 1 Ch. 109.

covenant to reinstate, and Sargant J., although expressing an opinion in guarded terms, did not decide the question whether the policy in that case was a sufficient compliance with the covenant to insure. Further, this covenant differs from the covenant in that case in that here the insurance company is designated, and therefore the covenant can have no secondary meaning given to it. This is a simple covenant to insure in a definite named company, and if that company never issued an absolute policy each defendant has fulfilled his covenant by effecting the policy which that company issued and which was taken out by the plaintiff himself. We submit that evidence is admissible to show that the named company never issued an absolute policy or a policy in any other form than that of the policy granted.

[ROCHE J. Is there not authority upon the meaning of insurance in a c.i.f. contract? It was discussed in *Groom, Ld.* v. *Barber*. (1)]

Yes; but there were special words in that case. Atkin J., however, referred to the statement of Hamilton J. in his judgment in *Biddell Brothers* v. *E. Clemens Horst Co.* (2) that the insurance in such contracts is upon the terms usual in the trade. That judgment of Hamilton J., reversed in the Court of Appeal (3), was restored by the House of Lords. (4)

Rogers v. *Whittaker* (5) shows that a fire caused by a bomb from an enemy Zeppelin was within the excepted risks of that policy, but neither that case nor *Drinkwater* v. *London Assurance Corporation* (6) has any bearing upon the construction of this covenant.

Richardson in reply. The evidence is not admissible in this case: *Enlayde, Ld.* v. *Roberts* (7), and per Channell J. in *Yuill & Co.* v. *Robson* (8); and it does not show that insurance against all fire risks was impossible. This covenant is absolute and covers insurance against loss or damage by fire, however caused.

Cur. adv. vult.

(1) [1915] 1 K. B. 316.
(2) [1911] 1 K. B. 214, 220.
(3) [1911] 1 K. B. 934.
(4) [1912] A. C. 18.
(5) [1917] 1 K. B. 942.
(6) (1767) 2 Wils. 363.
(7) [1917] 1 Ch. 109.
(8) [1907] 1 K. B. 685; affirmed [1908] 1 K. B. 270.

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Nov. 14. ROCHE J. stated the facts above set out and continued: At the hearing the contention of the plaintiff was that the defendants' covenants to insure against fire were absolute and unconditional and that the Alliance policies, although usual at the time they were effected, were not sufficient to comply with the covenant. Great reliance was placed upon the decision of Sargant J. in *Enlayde, Ld.* v. *Roberts* (1) and upon the passage from Wigram on Wills, 3rd ed., p. 17, referred to in that case. Shortly put, the contention of the defendants was that the covenant obliged the defendants to insure against fire with a named office or an approved substitute and to produce the policy of such office; that the policies they had effected with the named office or its successor in business were in the only form in which such policies ever were issued at any material times; that *Enlayde, Ld.* v. *Roberts* (1) was distinguishable and did not decide the present cases.

On behalf of the defendants Mr. Smith, the secretary of the Alliance Company, was called and stated that his office had never insured against fire occasioned by aircraft risks, and that he believed that nearly all offices in London or Westminster, and in particular all tariff offices, had adopted the same course. The policies of the Imperial and Alliance were stated by Mr. Smith to have always excepted the causes of loss or damage enumerated in condition 4 of the policies now in question. Counsel for the plaintiff suggested that this evidence was irrelevant and indeed inadmissible, and that in any event it did not show that insurance with a company against all fire risks was impossible, and that presumably at a high enough premium such risks would be undertaken by a company.

It is obvious that the questions thus raised are of very general importance, and for that reason, and because of my desire to consider further the decision and dicta of Sargant J. in *Enlayde, Ld.* v. *Roberts* (1), I reserved my judgment. Had that decision covered the present cases I should have followed it, but in my judgment it does not cover them. In that case Roberts, the defendant, was the lessee and sub-lessor of certain premises on the east coast of England and as sub-lessor had covenanted with his sub-lessee, who afterwards assigned his interest to the plaintiff company, Enlayde, Limited, to insure against fire and to reinstate and rebuild the premises in

(1) [1917] 1 Ch. 109.

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the event of damage by fire. All other repairs and reinstatements fell upon the plaintiff company. The premises were destroyed by fire caused by incendiary bombs dropped by enemy aircraft. The action was brought to determine the rights and liabilities of the parties. Sargant J. decided that the liability for the loss which occurred through the fire fell on the defendant and not on the plaintiffs. With that decision I respectfully agree. The dicta relied upon by the present plaintiff appear in the judgment for the following reason: It was argued for the defendant, as I understand the argument, that the covenants to insure and reinstate were correlative and coextensive; that for reasons and upon evidence similar to the reasons and evidence adduced by the defendants in the present cases the covenant to insure was not broken; that accordingly the liability to reinstate had not arisen. Sargant J. did not accept this line of reasoning, and not unnaturally treated the obligation to insure as ancillary to the obligation to reinstate instead of treating, as he was invited to do, the obligation to reinstate as ancillary to the obligation to insure. On this view of the lease he naturally rejected certain evidence as to the nature and effect of the ordinary policies of fire insurance. As to the covenant to insure itself, the learned judge stated (1): "It may be, although I do not say that it is the case, that the defendant had sufficiently discharged the mere covenant to insure by insuring against loss or damage by fire to the extent to which she actually did insure. I do not think that that is the right construction, but even if it were, it would by no means follow that the lessor would not be liable to make good, out of her own pocket, any amount which was not provided for in the result by the insurance which was actually effected." Thus the learned judge, while indicating his opinion, expressly states that it is not the basis of, and was not necessary for, his decision.

Under these circumstances it is my duty to form my own opinion, and in the present cases I think that the defendants have complied with their covenants. Where, as here, I find a covenant to insure with a named company or a specified class of companies by means of a policy against loss or damage by fire I am unable to see how the question whether the requirements of the covenant have been fulfilled can be decided without recourse to evidence to know the

(1) [1917] 1 Ch. 122.

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nature and character of the policies against fire issued by such companies. There seems to me no middle course between the reception of such evidence and the acceptance of the position that an absolutely unconditional policy must be procured. It is not without interest as a matter of history to observe that in 1767 (see *Drinkwater* v. *London Assurance Corporation* (1)) as well as at the present day (see *Rogers* v. *Whittaker* (2) and *Enlayde, Ld.* v. *Roberts* (3), to which I have already referred) policies issued by the companies there concerned have excepted or excluded what may compendiously be described as war risks. In the present cases I have not only the evidence of Mr. Smith, which I accept, but I find that the plaintiff's firm, in writing to the defendant Mr. Hitchens on March 15, 1916, adopt the same view. They say, " No notice has been taken by you of our several letters relative to the insurance of the above premises against loss or damage by fire through bombs or shells from enemy aircraft, although you are aware that the ordinary policy of insurance does not cover such risks." I find that this statement expresses the real fact, namely, that neither at the date of the leases nor at any subsequent date material to these actions did any company's policy of insurance against fire cover the risks in question. It was stated by counsel on behalf of the plaintiff that the plaintiff was willing to accept as complying with the covenant, or in lieu of compliance therewith, policies issued by the Government or by Lloyd's underwriters if they were taken out for a proper amount and for his benefit as well as for that of the lessees. This attitude is no doubt perfectly reasonable, but I think its adoption was not unconnected with the knowledge that the companies referred to in the leases were not issuing policies such as the plaintiff required and were not touching these war risks at all except as agents for the Government. To return to the letter of March 15, 1916, from which I have quoted above, it goes on to say that the covenant of the defendant contained in the lease is an absolute one. That statement I hold to be erroneous if read as meaning what I think it was intended by the writers to mean. The covenant, in my judgment, is to effect such a policy as is the usual policy of the companies in

(1) 2 Wils. 363. (2) [1917] 1 K. B. 942,
(3) [1917] 1 Ch. 109.

question at the date of the lease, or such a policy as may from time to time be usual during the currency of the lease. It is immaterial on the facts as I find them to decide whether the date of the lease or some other date during the currency of the lease is to be taken for the purpose of deciding what is a usual policy. Of the alternatives I prefer the latter. To say that the covenant to insure is absolute is in one sense true, but I presume it is intended to mean that an absolute and unconditional policy must be taken out. If so, conditions such as are found in this policy causing a forfeiture of benefits upon non-compliance with certain rules of conduct by the assured would certainly prevent the policy from being absolute or unconditional, and to effect such a policy would be, and was in these cases, a breach of covenant. It was indeed admitted on behalf of the plaintiff in these cases that the argument involved that the policies taken out since 1905 and renewed year by year through the agency of his firm were each of them policies in breach of the covenants of the lease. Such a result is, to say the least of it, a strange one, and its strangeness confirms my view that the premises from which it proceeds are unsound.

Further, although I recognize that a contract for the sale of goods on c.i.f. terms and a lease are documents of a different character, yet where both involve an obligation to insure I think there is at least an analogy between the obligations under the respective documents; and I therefore derive support for my conclusions from a statement of Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (1) He says: "The contract is to pay 'for the said hops at the rate of ninety (90) shillings sterling per 112 lbs., c.i.f. to London, Liverpool or Hull,' and the meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly"—and this is the matter that is now material—"to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer."

(1) [1911] 1 K. B. 214, 220.

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This statement of the law was accepted and acted upon by Atkin J. in *Groom, Ld.* v. *Barber*. (1) The decision in *Yuill & Co.* v. *Robson* (2) was relied upon by the plaintiff in the present case as in some way opposed to the view I am adopting, but I am of opinion it has no such effect.

The result is that I find that there has been no breach by either of the defendants of his covenant as to insurance and production of a policy, and accordingly there will be judgment for the defendant in each action with costs.

Solicitors: *E. J. Stokes; Hewitt & Chapman.*

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Oct. 31; *Nov.* 14.

[IN THE COURT OF APPEAL.]

GOLDREI, FOUCARD & SON *v.* SINCLAIR AND RUSSIAN CHAMBER OF COMMERCE IN LONDON.

[1916 G. 315.]

Judgment—Tortfeasors—Claim for Damages for Fraudulent Misrepresentations against Company and another—Alternative Claim against Company for rescission of Agreement—Separate Causes of Action—Judgment against Company on alternative Claim—Right to proceed against Co-defendant.

The plaintiffs in their statement of claim alleged that they were induced by false and fraudulent misrepresentations, made to them by the first defendant acting as the agent and with the knowledge and approval of the second defendants, the company, to enter into an agreement to become one of the founders of the company and for that purpose to pay to the company the sum of 105*l.*, and they claimed against both defendants damages for the fraud; and alternatively they alleged that by reason of the said false and fraudulent misrepresentations they were entitled to rescind the agreement, and they claimed against the company rescission of the agreement and the repayment of the 105*l.* with interest. The company made default in delivering a defence, and upon motion for judgment against the company on the statement of claim the plaintiffs recovered final judgment against them on the claim for rescission and the repayment of the 105*l.* The company did not repay the 105*l.* The first defendant delivered a defence,

(1) [1915] 1 K. B. 316, 322.
(2) [1907] 1 K. B. 685; [1908] 1 K. B. 270.

and the action proceeded against him. At the trial the jury found a verdict for the plaintiffs against him for 105*l.* damages. He appealed, and contended that, the defendants being joint tortfeasors, the plaintiffs by recovering judgment against the company were debarred from proceeding with the action against him :—

Held, by Pickford L.J. and Sargant J., Bankes L.J. dissenting, that the plaintiffs were entitled to recover, as there were two causes of action, one against the company for rescission of the agreement and the repayment of the 105*l.*, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud ; and that the judgment against the company on the claim for rescission was no bar to the claim against the first defendant for damages for fraud.

By Bankes L.J.: The plaintiffs' claims were in respect of the same subject-matter, and having recovered judgment against the company for the repayment of the 105*l.* they could not afterwards recover judgment for the same sum against the first defendant in respect of the same misrepresentations.

The rule laid down in *Brinsmead* v. *Harrison* (1871) L. R. 6 C. P. 584 ; (1872) L. R. 7 C. P. 547 as to joint tortfeasors has not been altered by any of the rules of Order XXVII.

APPEAL from the judgment of Lawrence J. on further consideration after the trial of the action with a jury.

The action was brought against one Sinclair and the Russian Chamber of Commerce in London (hereinafter called the company). The company was registered on March 25, 1915, under the Companies Acts, 1908 and 1913, as an unlimited company and not having a share capital. According to its memorandum of association one of the objects of the company was to promote, extend, and further the commercial, industrial, and financial relations between the British and Russian Empires. The statement of claim alleged in the first fourteen paragraphs that the defendant Sinclair, acting as the agent and on behalf of and with the knowledge and approval of the defendant company, made certain false and fraudulent representations to the plaintiffs whereby the plaintiffs on June 8, 1915, were induced to agree to become one of the founders of the Russian Chamber of Commerce in London, and for that purpose to pay to the company the sum of 105*l.* Paragraph 15 of the statement of claim was as follows: "By reason of the premises the plaintiffs have suffered damage. The sum of 100 guineas subscribed by the plaintiffs as alleged in paragraph 8 hereof has been wholly

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lost, and the plaintiffs have not and cannot receive any of the benefits in consideration of which they paid the same to the company." Paragraph 16: "Alternatively the plaintiffs say that they were induced to enter into the agreement with the company to become founders of the Russian Chamber of Commerce in London by the representations alleged in paragraphs 2, 3, 4, 5, 6, and 7 hereof, and that such representations are false and fraudulent as alleged in paragraphs 9, 10, 11, 12, 13, and 14 hereof, and that by reason thereof they are entitled to rescind the agreement under which they paid to the company the sum of 105*l.*"

The plaintiffs claimed, "(1.) as against both defendants, damages for the fraud; (2.) as against the company, rescission of the agreement to become founders of the Russian Chamber of Commerce in London and repayment of the sum of 100 guineas, together with interest at the rate of 5 per cent. per annum from the 9th June, 1915."

The writ in the action was issued on February 26, 1916. The company put in no defence. The defendant Sinclair in his defence denied the allegations in the statement of claim. On November 20, 1916, the plaintiffs moved for judgment upon the statement of claim against the company in default of defence, and obtained judgment for rescission of the agreement and for the repayment of the 105*l.* with interest at 5 per cent. per annum. The defendant Sinclair thereupon amended his defence by adding the following paragraph: "Alternatively on the 20th day of November, 1916, the plaintiffs obtained judgment upon the statement of claim in this action against the defendants the Russian Chamber of Commerce in London by reason whereof this defendant will contend that the plaintiffs are estopped from maintaining or further proceeding with this action against this defendant."

The defendant company did not pay the 105*l.*, and the action proceeded to trial as against the defendant Sinclair. At the trial before Lawrence J. the jury found for the plaintiffs against the defendant Sinclair 105*l.* damages, the amount claimed. Lawrence J. held that there were two causes of action alleged, one for unliquidated damages for fraud against both defendants, and the other against the company alone for rescission of the agreement obtained by misrepresentations of fact even though

innocent, with the consequential right to have restitution of the money received by the company. The right to rescission and repayment did not exist against Sinclair. The default judgment against the company did not purport to deal with the cause of action for fraud, and no judgment was entered in respect of this cause of action. Only an interlocutory judgment could have been entered upon the cause of action for fraud, leaving the damages to be assessed by a jury. Nor did the default judgment against the company operate as a release or abandonment of the cause of action for fraud so as to estop the plaintiffs from proceeding against Sinclair. Release and abandonment involved intention, and there was no evidence of any such intention. He accordingly gave judgment for the plaintiffs against the defendant Sinclair for the damages found by the jury.

The defendant Sinclair appealed.

Patrick Hastings, for the defendant Sinclair. The two defendants were joint tortfeasors, and judgment against one is a bar to an action against the other for the same cause of action, although the judgment remains unsatisfied: *Brinsmead* v. *Harrison* (1), following the decision in *Brown* v. *Wootton*. (2) In *King* v. *Hoare* (3) the same rule was laid down in the case of joint contractors, and in *Kendall* v. *Hamilton* (4) the House of Lords approved and followed that decision. The statement of claim alleges only one cause of action against both defendants. It alleges fraudulent misrepresentations by both defendants and claims 105*l*. damages against both and rescission of the agreement as against the company. The latter claim is founded in the statement of claim on the fraudulent misrepresentations, and the motion for judgment was on the statement of claim as it stood and nothing else, the facts stated in it being admitted by the company: *Young* v. *Thomas*. (5) The plaintiffs obtained final judgment against the company—not an interlocutory judgment for damages to be assessed under Order XXVII., r. 5—for the amount claimed, and they cannot

(1) L. R. 6 C. P. 584; L. R. 7 C. P. 547.
(2) (1605) Cro. Jac. 73; Yelv. 67.
(3) (1844) 13 M. & W. 494.
(4) (1879) 4 App. Cas. 504.
(5) [1892] 2 Ch. 134.

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afterwards continue the action against the other defendant. *Thurman* v. *Wild* (1) shows that the acceptance of satisfaction from one joint tortfeasor is a defence to an action against the other. Order XXVII., rr. 2 and 3, do not assist the plaintiffs, as they only apply to a claim for a debt or liquidated demand, and none of the other rules affect this case. Further, even if there were two causes of action, the fact that no judgment was signed against the company on the claim for damages for fraudulent misrepresentations was an abandonment of that claim, and therefore it operated as a release of that cause of action against the defendant Sinclair. [*Lythgoe* v. *Vernon* (2) was referred to on this point.]

Holman Gregory, K.C., and *Zeffertt*, for the plaintiffs. There are two causes of action alleged in the statement of claim, one for the equitable relief of rescission of the agreement and the return of the money paid under it, and the other for damages for fraud. The first cause of action is maintainable even if the misrepresentation is an innocent one; fraud is not a necessary element, and may be rejected as surplusage: *Swinfen* v. *Lord Chelmsford*. (3) Paragraph 16 of the statement of claim therefore discloses a separate cause of action for rescission, and the allegation that the representations were made fraudulently does not add to it. "Cause of action" means every fact necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court: *Read* v. *Brown*. (4) But even assuming that the plaintiffs have made fraud part of their cause of action against the company for rescission, that cause of action is still distinct from the other cause of action against both defendants for damages for the fraud. No judgment has been entered against the company in respect of this latter cause of action. A judgment on that cause of action could only be an interlocutory judgment under Order XXVII., r. 5, for damages to be assessed. The causes of action are separate: see *Salford Corporation* v. *Lever* (5); *Wegg Prosser* v. *Evans*. (6) The rule of law is technical and ought not to be extended. (7) With regard to Order XXVII., the scheme seems to be to allow final judgment to be entered against

(1) (1840) 11 Ad. & E. 453.
(2) (1860) 5 H. & N. 180.
(3) (1860) 5 H. & N. 890, 920, 921.
(4) (1888) 22 Q. B. D. 128, 131.
(5) [1891] 1 Q. B. 168.
(6) [1895] 1 Q. B. 108.
(7) Ibid. 112.

one defendant without affecting the right to proceed with the action against the other defendants, though this seems to be limited by rr. 2 and 3 to an action for a debt or liquidated demand.

Patrick Hastings in reply.

Cur. adv. vult.

Nov. 14. PICKFORD L.J. read the following judgment:—This is an appeal by the defendant Sinclair against a judgment of Lawrence J. given in the following circumstances: The plaintiffs sued the defendant Sinclair and a company called the Russian Chamber of Commerce in London to recover damages for fraudulent representations made to them by the defendant Sinclair with the knowledge and authority of the defendant company, alleging that they were induced by such representations to subscribe 105*l.* in order to become one of the founders of the Russian Chamber of Commerce in London. A cheque for the amount was given to the defendant Sinclair and handed by him to his co-defendants. The plaintiffs also claimed as against the defendant company rescission of the agreement to become a founder and a return of the money paid with interest. The defendant company made default in delivering a defence, and on motion made by the plaintiffs judgment was given against the company for rescission of the agreement and the return of the money paid with interest. This judgment is, so far as the return of the money is concerned, still unsatisfied. The action proceeded against the defendant Sinclair, and the jury found a verdict against him on the ground of fraudulent misrepresentation, and assessed the damages at 105*l.* The defendant Sinclair by an amendment to his defence pleaded the fact of the judgment against the defendant company, and alleged that thereby the plaintiffs were estopped from maintaining or further proceeding with the action against him. Such a defence is entirely technical and has no substance or merits, but the defendant Sinclair has a right to succeed on it if it be established.

The main ground of the contention was that the case fell within the principle of the decisions in *King* v. *Hoare* (1), *Kendall* v. *Hamilton* (2), and *Brinsmead* v. *Harrison*. (3) That principle, as I

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

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understand it, is that if judgment be given against one of two joint tortfeasors the whole cause of action merges in that judgment, and therefore cannot proceed against the other tortfeasor. Obviously this must depend upon whether the judgment is in respect of the same cause of action, for a judgment against one tortfeasor for a cause of action other than the joint tort cannot affect the cause of action on the joint tort. Lawrence J. held that in this case there were two causes of action, and that the judgment was in respect of a cause of action other than that arising from the joint tort. I think his decision was correct.

A person who has been induced by misrepresentations to take shares in a company has two remedies open to him. He may bring an action against the company only for rescission of the contract and return of the money paid, or he may bring an action for fraudulent representations against both the company and its agent where the two have joined to commit the fraud. He may also take both these courses if he wish. In the former case, that is, an action for rescission and return of the money paid, the plaintiff need not prove fraud, but will succeed if he establish an innocent misrepresentation : *Redgrave* v. *Hurd* (1) and *Karberg's Case.* (2) He can in such an action obtain no relief against the agent of the company. If he do prove fraud in an action solely for rescission and return of the money he is in no better position than if he had proved innocent misrepresentation. In an action for damages arising from misrepresentations made jointly by the company and its agent he cannot succeed unless he prove that the misrepresentations were made fraudulently, and the measure of damages in such an action is not necessarily the amount of the money paid to the company. The question seems to me to be whether these two actions are founded on the same or different causes of action. A cause of action has been defined to be every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court : *Read* v. *Brown* (3), per Lord Esher M.R., citing *Cooke* v. *Gill.* (4) In these two actions there is a fact, that is, fraud, which if traversed must be proved to support the action for damages for misrepresentation, but which need not be proved in

(1) (1881) 20 Ch. D. 1.
(2) [1892] 3 Ch. 1.
(3) 22 Q. B. D. 128, 131.
(4) (1873) L. R. 8 C. P. 107.

an action for rescission, and if disproved still leaves the plaintiff entitled to a judgment if he prove misrepresentation in fact. In addition the remedy is against the company only in the latter case and against both the company and its agent in the former, and the measure of relief is not necessarily the same. I think, therefore, that the two forms of action are founded upon different causes of action.

It remains to apply this principle to the present case. In paragraphs 1—15 of the statement of claim the plaintiffs allege fraudulent misrepresentations by the defendant Sinclair on behalf and with the knowledge and authority of the defendant company, and if the claim stopped there it would have been an action for damages only. But in paragraph 16 the plaintiffs claim rescission and return of the money paid, and allege as a ground of their claim the fraudulent representations set out in the previous paragraphs, expressly stating them to have been made fraudulently. They then in the prayer of the statement of claim ask against both defendants damages for fraud and against the company only rescission and repayment. I think paragraph 16 alleges a different cause of action from that alleged in the previous paragraphs. It was hardly contested that, if paragraph 16 had claimed rescission by reason of an innocent misrepresentation, it would have alleged a different cause of action ; but it was contended that because fraud was alleged and admitted by the default of defence the whole claim was in respect of fraud and was only one cause of action. Reliance was also placed, as I understood the argument, upon the fact that the sum recovered against the defendant Sinclair was of the same amount as that which the company were ordered to repay. It seems to me that the fact that the sums recovered in the two forms of action happen in this case to be of the same amount cannot show that the causes of action are the same. If, as I have stated before, fraud is not a necessary part of the cause of action in a claim for rescission, the fact that it is alleged and admitted is immaterial. If disproved, the plaintiffs could still recover, and the allegation and admission of an immaterial fact cannot change the nature of the cause of action. This is in accordance with the case of *Swinfen* v. *Lord Chelmsford*. (1) That was a case of an unnecessary allegation

(1) 5 H. & N. 890, 920.

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of fraud. In *Williamson* v. *Allison* (1) Lawrence J. said: "If the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action."

The judgment that was signed in this case was signed only upon the claim for rescission, and no judgment was given on the claim for fraudulent mispresentations. If given it could only have been an interlocutory judgment. For these reasons I think the judgment given was not in respect of the cause of action on which judgment has been given against the defendant Sinclair, and his main point fails.

I have not dealt with the question whether Order XXVII. applies to this case. I am inclined to think it does not, though I do not understand why when the doctrine of *King* v. *Hoare* (2) and *Brinsmead* v. *Harrison* (3) was abolished by the rules in some actions it was not abolished in all.

The defendant Sinclair also contended that the fact that no judgment was signed and no further proceedings taken on the claim for fraud against the company operated as a release of that cause of action against him. This contention, as I understand it, is not on the ground of merger, but on the ground that the plaintiffs released the company from any claim for fraud by taking judgment on the claim for rescission only, and so released also their joint tortfeasor the defendant Sinclair. I think the plaintiffs had no intention of releasing any one, and this is shown by the fact that no judgment was given in favour of the company on the claim for fraud. It may be, though I do not say it is the fact, that the circumstances may give the company some right to object to further proceedings against them in the action, but I do not see anything in the circumstances to operate as a release of the defendant Sinclair.

I think the appeal should be dismissed with costs.

BANKES L.J. read the following judgment:—This is an appeal from a judgment of A. T. Lawrence J. It raises the question whether the respondents are entitled to proceed with their action against the

(1) (1802) 2 East, 446, 452.
(2) 13 M. & W. 494.
(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

appellant after having signed judgment in default of defence against the other defendants in the action, the Russian Chamber of Commerce in London. It is, I think, clear that the respondents cannot bring their case within any of the rules of Order XXVII. so as to be able to claim the relief afforded by those rules to a plaintiff who signs judgment against one of several joint contractors or joint tort-feasors, as the case may be. The rule of law applicable to the case is therefore that laid down by Parke B. in *King* v. *Hoare* (1): "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, 'transit in rem judicatam'—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two." Willes J. in *Nelson* v. *Couch* (2) points out what must be shown under the plea of exceptio rei judicatae; and the first instance he gives is a merger of the entire cause of action in the judgment which it alleges. The rule apparently applies also to cases where, although the cause of action may not in the sense sometimes given to the expression be the same, a second action is brought in respect of the same subject-matter. See *Phillips* v. *Berryman* (3) and the observations of Brett M.R. and Bowen L.J. in *Brunsden* v. *Humphrey* (4), and the definition of "cause of action" in its popular sense given by Brett J. in *Jackson* v. *Spittall.* (5) It is necessary, therefore, in the present case to look closely into the statement of claim in order to ascertain what the case of the respondents is. The statement of claim sets out very

(1) 13 M. & W. 504.
(2) (1863) 15 C. B. (N.S.) 99.
(3) (1783) 3 Doug. 286.
(4) (1884) 14 Q. B. D. 141, 146, 152.
(5) (1870) L. R. 5 C. P. 542, 552.

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fully the facts. It is, I think, quite clear that the respondents' claim is founded upon fraud and upon fraud only. So framed, the respondents had the right, if the fraud was proved, to rescission of the agreement. This, however, was a remedy against the chamber of commerce only. The claim to damages was a claim against both defendants as joint tortfeasors. The statement of claim, in my opinion, discloses no grounds upon which the respondents could recover any damages beyond the 100 guineas paid to the chamber of commerce. So far, therefore, as the claim of the respondents is a claim for damages the statement of claim alleges but one cause of action. If it is permissible upon the present statement of claim to say that the respondents have claimed a return of the 100 guineas with interest, as though they had alleged an inducement to enter into the contract by innocent misrepresentation, the result must, I think, be the same. The action is in respect of the same subject-matter, and having signed judgment for the 100 guineas the respondents cannot now ask a jury to award them the same sum as damages in respect of the same misrepresentations. Even if it were open to the respondents to say that as against the appellant they are alleging that the misrepresentations relied on were false to his knowledge, whereas in their claim against the chamber of commerce they were content to treat them as innocent, the case is not thereby taken out of the rule laid down by Buller J. in *Phillips* v. *Berryman* (1), that a recovery in one personal action is a bar to all other personal actions in respect of the same subject-matter.

In my opinion, the present is a case in which, so far as the claim for damages is concerned (which is the only matter with which the appellant is concerned), the respondents had alternative remedies for the same subject-matter, but not collateral concurrent remedies, as in *Drake* v. *Mitchell* (2), or alternative remedies in respect of different subject-matters, as in *Midland Ry. Co.* v. *Martin & Co.* (3) Even if the statement of claim discloses different causes of action, namely, a claim for rescission of the agreement and a return of the money paid on the ground of innocent misrepresentation as well as a claim for rescission of the agreement and for damages on the ground of fraud (which I doubt having regard to the fact that

(1) 3 Doug. 288. (2) (1803) 3 East, 251.
(3) [1893] 2 Q. B. 172.

judgment was signed by default), I consider that no sufficient distinction can be drawn between the claim to recover the 100 guineas with interest for which judgment has been signed and the claim for the 105*l.* damages which the jury have awarded, to take the case out of the rule upon which the appellant relies. Both claims appear to me to arise out of the same act on the part of the appellant, and, according to the definition of Brett J. in *Jackson* v. *Spittall* (1), the respondents, therefore, have only one cause of action.

I think that the appeal should be allowed, but as the other members of the Court think otherwise it will be dismissed.

SARGANT J. read the following judgment:—In this case I agree with the other members of the Court that the rule in *Brinsmead* v. *Harrison* (2) has not been altered as regards joint tortfeasors by any of the rules of Order XXVII. For some reason or other, very likely in view of the difficulty of obtaining final judgment in the case of unliquidated damages until the actual assessment of damages as hereinafter mentioned, rr. 2 and 3 of that order are carefully worded so as to apply only to the analogous case of persons jointly liable in debt or liquidated damages. It is unnecessary for me to add anything further on this point.

It follows, therefore, that if the plaintiffs had recovered judgment against the Russian Chamber of Commerce for an ascertained amount of damages in respect of the fraudulent misrepresentations alleged in the statement of claim, this judgment would have operated to prevent their subsequently recovering damages against the defendant Sinclair. The fraudulent misrepresentations alleged against each defendant are the same, and the defendant Sinclair is alleged to have made each misrepresentation as the agent and on behalf and with the knowledge of the defendant company. In these respects the analogy with *Brinsmead* v. *Harrison* (2) is complete. But it has been pointed out by Lawrence J., and is a consideration of some importance, that the plaintiffs could not under the procedure they have adopted, that is, on motion for judgment, have obtained judgment against the defendant company for any definite

(1) L. R. 5 C. P. 542, 552.
(2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

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sum in respect of their fraudulent misrepresentations. They could only have got judgment for an amount of damages to be subsequently assessed by a jury. And in this case under Order XXVII., r. 5, these damages would normally have been assessed " at the same time with the trial of the action " against the defendant Sinclair. So that even had the plaintiffs pressed their claim for damages for fraudulent misrepresentation against the defendant company, and not their claim for rescission, the difficulties pointed out in *Brinsmead* v. *Harrison* (1) would not have arisen.

In fact, however, the plaintiffs have taken judgment against the defendant company on the alternative claim made against them, and against them only, in the pleadings, namely, a claim for rescission and as incidental thereto for the return of the amount paid by the plaintiffs. This alternative claim constitutes, in my judgment, a separate and distinct cause of action resting on a different foundation and involving very different remedies. To obtain rescission not only is it not necessary to prove fraud—a distinction which perhaps is not of so much importance here, since it is fraudulent misrepresentation that is alleged throughout by the statement of claim—but it is not necessary to prove damage. And rescission involves, not the ascertainment and payment of any damages, but the repayment of such a sum and the doing of such other acts as shall effect a restitutio in integrum. The fact that in the present case the measure of damages for fraudulent misrepresentation may approximate to, or even be identical with, the amount payable under a judgment for rescission is not, in my opinion, of any real importance, especially in the case of a judgment which has not been satisfied.

On the whole I can see no reason for extending the highly technical rule in *Brinsmead* v. *Harrison* (1) to a case so widely different as the present. It is essential to the application of the doctrine in that case and the previous case of *King* v. *Hoare* (2) that the judgment which operates as a bar should be in respect of the same cause of action.

As regards any suggested release or abandonment by the plaintiffs, I agree with Lawrence J. in failing to find any intention either

(1) L. R. 6 C. P. 584; L. R. 7 C. P. 547. (2) 13 M. & W. 494.

to release or abandon any right or remedy against the defendant Sinclair. In my opinion, therefore, the appeal should be dismissed.

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Appeal dismissed.

Solicitors for plaintiffs: *Woodthorpe, Browne & Co.*
Solicitors for defendant Sinclair: *Poole & Robinson.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A. 1917 *Nov.* 26.

MARCONI'S WIRELESS TELEGRAPH COMPANY, LIMITED *v.* THE KING.

Petition of Right—Trial—Right of Suppliant to Jury—Claim for Damages for Breach of Contract—Petitions of Right Act, 1860 (23 & 24 *Vict. c.* 34), *s.* 7.

Sects. 1 to 6 of the Petitions of Right Act, 1860, enact new rules of practice and procedure applicable to petitions of right, and s. 7 provides that so far as the same might be applicable, and except in so far as might be inconsistent with the Act, the practice and course of procedure of the Courts of Law and Equity respectively for the time being in reference to suits and personal actions between subject and subject "shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right." By s. 18, nothing in the Act shall prevent the suppliant from proceeding as before the Act:—

Held, that in the case of a petition of right presented under the Act the Court has power under s. 7 to order the petition to be tried without a jury, though, if it had been an action between subject and subject, either party would have been entitled to a jury.

APPEAL from an order of Atkin J. in chambers.

A petition of right of Marconi's Wireless Telegraph Company, Limited, alleged that by an agreement dated July 30, 1913, and made between the suppliants and His Majesty's Postmaster-General on behalf of His Majesty and also on behalf of the Governments of India and of the Union of South Africa and such other Governments as should thereafter adopt the agreement, it was

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agreed that the suppliants should construct and establish long-distance installations at such stations as the Postmaster-General should specify in certain countries, dominions and protectorates, so as to provide efficient communication by wireless telegraphy between the stations, and that the Postmaster-General should pay a certain sum for each long-distance installation when constructed and royalties. The petition further alleged that the Postmaster-General on December 30, 1914, repudiated the agreement, and it claimed a declaration that the Postmaster-General was not entitled to repudiate the agreement and that the suppliants were entitled to damages. The answer denied the repudiation of the agreement.

The suppliants applied for an order that the petition of right should be tried with a special jury, contending that if this had been an action between subject and subject the plaintiffs would have been entitled to a jury. The Master refused the application, and upon appeal Atkin J. affirmed the order. The learned judge was of opinion that s. 7 of the Petitions of Right Act, 1860 (1)—which provided that the practice and procedure applicable for the time being to personal actions between subject and subject should, "unless the Court in which the petition is prosecuted shall otherwise order," apply to a petition of right—gave him a discretion to vary the practice under the Judicature Rules, and that therefore he had a discretion to order the action to be tried by a judge without a jury. The suppliants therefore were not entitled to a jury as of

(1) 23 & 24 Vict. c. 34, s. 7: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of procedure of the said Courts of Law and Equity respectively for the time being in reference to such suits and personal actions, shall, unless the Court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right; Provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

right, and in the exercise of his discretion he came to the conclusion in the circumstances that the case was not one suitable for trial with a jury.

The suppliants by leave appealed.

Leslie Scott, K.C., and *Stuart Bevan*, for the suppliants. If this were an action between subject and subject, the object of the action being the recovery of damages, the plaintiffs would, before the Judicature Act, 1873, have been entitled to a jury. A Court of Equity was not the appropriate tribunal to give such relief: Mitford on Pleadings, p. 37. Therefore since the Judicature Acts the plaintiffs would be entitled to a jury: Order XXXVI., r. 6; *Jenkins* v. *Bushby*. (1) The old procedure in petitions of right was very involved; it is set out fully in *Baron De Bode's Case*. (2) The Petitions of Right Act, 1860, was passed to simplify the procedure, and it enacts certain procedure as being applicable to petitions of right. Sect. 7 applies the practice and course of procedure for the time being in force in actions between subject and subject "so far as the same may be applicable and except in so far as may be inconsistent with this Act," and subject to the further exception, "unless the Court in which the petition is prosecuted shall otherwise order." Sect. 18 provides that nothing in the Act shall prevent a suppliant from proceeding as before the Act. This petition was presented under the new procedure stated in the Act. Subject to the provisions of the Act the ordinary practice as between subject and subject applies. The suppliants before the Judicature Acts would have been entitled to a jury, and in *Baron De Bode's Case* (3) a jury was summoned to try the issues. Therefore under Order XXXVI., r. 6, which is made applicable, the suppliants are now entitled to a jury. Atkin J. held that the words in s. 7 of the Act of 1860, "unless the Court . . . . shall otherwise order," gave him a discretion to order otherwise than as provided by Order XXXVI., r. 6. That provision in s. 7 does not give the Court power to vary the practice and procedure. It merely gives the Court power to say, when a petition is presented under the Act, that the old procedure shall apply. It preserves the right of the Crown to have the

(1) [1891] 1 Ch. 484, 489, 492. (2) (1845) 8 Q. B. 208.
(3) Ibid. 242.

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old procedure applied. It may be that it gives the Court power to apply the old procedure in part, though it is probably limited to a power to apply the old procedure as a whole instead of the new. The new procedure being applicable, the Court has no power to vary it by ordering a trial by a judge without a jury. Sect. 7 gives no powers to invent a new procedure and dovetail it into the ordinary procedure.

Next, if the Court has a discretion as to the mode of trial, no case has been made out for depriving the suppliants of the right of having the petition tried by a jury. Certainly no case has been made out under Order XXXVI., r. 5.

Sir Gordon Hewart, S.-G., and *Branson* (*Harold Smith* with them), for the Crown. There are two limitations in s. 7 of the Petitions of Right Act, 1860, upon the application to petitions of right under the Act of the practice and procedure in ordinary actions. There is first the general limitation, "so far as the same may be applicable and except in so far as may be inconsistent with this Act"; and there is the further limitation, "unless the Court . . . . shall otherwise order." Therefore the ordinary procedure applies so far as it is applicable and is not inconsistent with the Act, and even then it only applies unless the Court otherwise orders. The plain meaning of this latter limitation is to give a discretion to the Court to order that some part of the ordinary procedure as between subject and subject shall not apply. There is no reason for limiting the discretion so given to a power to order the old procedure to apply either in whole or in part. It would be impossible to graft the new procedure on to the cumbersome procedure set out in *Baron De Bode's Case*. (1) A suppliant can proceed under the old procedure if he chooses: s. 18. If he proceeds under the new procedure, the Court has a discretion to vary in one or more of its incidents the procedure as between subject and subject which would otherwise apply. The learned judge had a discretion under s. 7, and the Court will not interfere with the exercise of his discretion. Further, if s. 7 does not give the discretion contended for, the suppliants are not entitled as of right to a jury. Order XXXVI., r. 6, is subject to r. 5, which gives the judge a discretion as between subject and subject to order a trial without a jury of a case which involves a prolonged examination

(1) 8 Q. B. 208.

of documents: *Jenkins* v. *Bushby*. (1) That applies to this case. [*Tomline* v. *Reg.* (2) was also referred to.]

Leslie Scott, K.C., in reply. No doubt r. 6 must be read subject to r. 5, but this case is not within r. 5.

[PICKFORD L.J. No case has been made out under r. 5.]

[Counsel referred to r. 7 of the rules made by the Court of Chancery under s. 15 of the Act of 1860 in respect of petitions of right intituled in the Court of Chancery, set out in Robertson's Civil Proceedings by and against the Crown, p. 805, and also to p. 690 of the same work, where it is stated that no rules had been made under the section by the Courts of common law.]

PICKFORD L.J. This is an appeal from the decision of Atkin J. in chambers affirming an order of the Master that the petition of right be tried by a judge without a jury.

The petition raises questions as to an alleged breach of a contract entered into by the Postmaster-General with the suppliants for the establishment of certain wireless stations. The suppliants say that by reason of that breach they have suffered serious damage. When the prayer of the petition is divested of the clothing of declarations it resolves itself into a claim for damages for breach of contract. For the purposes of this case I shall assume that if this had been an action by one subject against another either party would have been entitled to have had the case tried with a jury, subject always to the provisions of r. 5 of Order XXXVI., which have no application here because no foundation has been laid for their application. Upon that assumption the question is whether the suppliants in a petition of right against the Crown are in the same position. That depends upon s. 7 of the Petitions of Right Act, 1860. Before that Act the procedure in petitions of right was somewhat obscure. It is described in *Baron De Bode's Case* (3), and we are told that before that case it had not been necessary to consider the procedure under petitions of right for over 200 years because no petition of right had been presented during that period.

In 1860 the Petitions of Right Act was passed, which recites that "it is expedient to amend the law relating to petitions of right, to

(1) [1891] 1 Ch. 490. (2) (1879) 4 Ex. D. 252.
(3) 8 Q. B. 208.

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simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject." Sect. 1 provides that the petition of right may be intituled in any of the superior Courts of common law or equity at Westminster, and then follow provisions specifying the practice and procedure; and the last section in the Act, s. 18, provides that "Nothing in this Act contained shall prevent any suppliant from proceeding as before the passing of this Act." Therefore a suppliant may proceed either under the old procedure or under the new; but if he proceeds under the new he is subject to the provisions of the Act.

Sect. 7, which is the important section for the purpose of this case, is as follows: [The Lord Justice read the section.] Therefore upon that section, applying the procedure as between subject and subject, and assuming that either party, if this had been an action between subject and subject, would have been entitled to a jury, the suppliants are so entitled unless there is power in the Court to otherwise order under the words "unless the Court in which the petition is prosecuted shall otherwise order." I can see no reason for limiting those words and for saying that they do not give a discretion to order that the procedure thus incorporated shall be varied by not applying it in a particular instance. The argument addressed to us was that this limit must be placed upon the words, namely, that they only empower the Court, if a petition of right is initiated under the new practice, to order that the old practice shall apply, or, if that be not the true limitation, to order that the old practice shall apply either in whole or in part. I can see no necessity for placing any such limitation upon the words. The words "unless the Court or a judge shall otherwise order" are well known in the rules relating to procedure, and they are inserted for the purpose of giving a discretion to the Court to alter the procedure which would otherwise be applicable. I agree with Atkin J. that there is no reason for limiting the words, and that they give a discretion to the Court to order otherwise than the rules of procedure by themselves would provide. It being therefore a matter of discretion, inasmuch as both the Master and the judge have exercised their discretion in the same way, it would require

the very strongest case to induce this Court to interfere with the exercise of that discretion; but if it were necessary to consider it, in my opinion the learned judge and the Master exercised their discretion rightly. There are many cases between subject and subject where the parties have a right to a jury which would be much better tried without a jury, but the right to a jury remains. The present is a complicated case and turns largely on the correspondence, and it will be very much better tried by a judge alone, and therefore I think that the discretion was properly exercised, but, whether that be so or not, no case has been made out for interfering with the exercise of the discretion. The appeal will be dismissed.

BANKES L.J. I am of the same opinion. If this had been an action between subject and subject I agree with the suppliants' contention that the plaintiffs would have been entitled to a jury as of right. This being a petition of right, the matter is different, and the only question which it is material to consider is the proper construction of a few words in s. 7 of the Petitions of Right Act, 1860. In my view Atkin J. gave a right construction to those words. The Act does two things with regard to petitions of right. It preserves the old procedure, whatever it was, by s. 18, and it creates a new procedure; and with respect to the new procedure it lays down certain rules and regulations, some specific and some general. It appears to me that ss. 2 to 6 may be regarded as specific regulations and s. 7 as a general regulation. Sect. 7 provides that the practice and procedure applicable to actions or suits between subjects shall apply to petitions of right with certain exceptions. Those exceptions are expressed in two sentences, one general and the other specific. The general sentence is in this form: "So far as the same may be applicable, and except in so far as may be inconsistent with this Act." In other words, the section provides that such parts of the practice and procedure in actions between subjects as are applicable and not inconsistent with anything in the Act shall apply. Then it places a further limitation upon their applicability: "unless the Court in which the petition is prosecuted shall otherwise order." It seems to me to be clear that, if the meaning of the section is that it enacts a

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general regulation limited to such portion of the practice and procedure in actions between subjects as are applicable and are not inconsistent with the Act, the later limitation must also refer to such portion of the practice and procedure as the judge may in his discretion say shall not be applicable in the particular instance.

The learned judge having taken a right view of the construction of the section, we ought not to interfere with the exercise of his discretion. I should, however, be prepared, if necessary, to say that he exercised his discretion rightly. The result is that the appeal fails.

Appeal dismissed.

Solicitors for suppliants : *Coward & Hawksley, Sons & Chance.*
Solicitor for Crown : *C. Llewelyn Davies.*

W. F. B.

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Nov. 27.

WELLAWAY *v.* COURTIER.

Trespass—Possession, when sufficient to support Action.

The plaintiff and the defendant were the purchasers, the plaintiff of a crop of growing turnips and the defendant of a crop of grass, from the same tenant farmer, the turnips and the grass being in adjoining fields. A condition of the sale of the turnips was that the plaintiff should not remove more than half of them, the other half having to be consumed on the ground. A number of sheep which had been put by the defendant into the pasture field escaped therefrom on to the turnip field and ate a quantity of the turnips. The plaintiff claimed damages in respect of the trespass by the defendant's sheep :—

Held, that the plaintiff had an exclusive right of possession of the turnip crop notwithstanding the fact that his right to dispose of it when severed was limited, and that he was entitled to maintain trespass.

APPEAL from Exeter County Court.

The plaintiff and the defendant purchased, at an auction sale on March 27, 1917, the plaintiff a crop of growing turnips and the defendant a crop of grass, from the same tenant farmer, the turnips and the grass being in adjoining fields. A condition of the sale of

the turnips was that the plaintiff should not remove more than half of them, the other half having to be consumed on the ground. The defendant put a flock of sheep on to the field of grass, and shortly thereafter, on three successive days in April, 1917, a number of the sheep escaped from the pasture field into the turnip field, where they ate a considerable quantity of the turnips. There was evidence that on the first day the sheep got into the turnip field through a gate which had been left open by the plaintiff or his servant, and on the other days that they had broken through a copse and hedge to get to the turnip field. Witnesses were called who stated that sheep which had once fed off turnips in an adjoining field were much more likely to break through the dividing hedge and get at the turnips than sheep which had had no such experience. The plaintiff claimed damages in respect of the trespass by the defendant's sheep.

The county court judge gave judgment for the defendant, holding that he was under no obligation to repair the fence between the two fields, and had been guilty of no breach of duty. The county court judge further stated that if it had been necessary to decide the point he would have felt a difficulty in holding that the plaintiff had not by his carelessness in leaving the gate open materially contributed to the injury he had sustained.

The plaintiff appealed, and in the Divisional Court he agreed to make no claim in respect of damage on the first day the sheep got into the turnip field.

Hawke, K.C., and *Jowitt*, for the plaintiff. The defendant, although not obliged to fence his close, was under an obligation to keep his sheep on his close, and having failed in that duty he is liable for the damage caused to the plaintiff: *Cox* v. *Burbidge* (1); *Fletcher* v. *Rylands* (2); *Lee* v. *Riley* (3); *Holgate* v. *Bleazard*. (4) The plaintiff, as the purchaser of the turnips, had an interest in the land sufficient to enable him to maintain an action of trespass: Rolle's Abridgment, tit. "Trespass," sub-tit. "H," p. 549; *Crosby* v. *Wadsworth*. (5) The only defence of which the defendant could in

(1) (1863) 13 C. B. (N.S.) 430, 438.
(2) (1866) L. R. 1 Ex. 265.
(3) (1865) 18 C. B. (N.S.) 722.
(4) [1917] 1 K. B. 443.
(5) (1805) 6 East, 602.

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law avail himself would be leave and licence by the plaintiff, but there was no evidence to support that defence. The fact that the sheep trespassed on the plaintiff's close on the first day imposed a stronger duty on the defendant to keep them from trespassing again. [*Churchill* v. *Evans* (1) and Bullen and Leake's Precedents of Pleading, 3rd ed., p. 416, were also referred to.]

Foote, K.C., and *Dummett*, for the defendant. It is true that it is not necessary in an action of this kind for the plaintiff to prove negligence on the part of the defendant. That is shown by *Ellis* v. *Loftus Iron Co.* (2) But there are special facts in the present case upon which the defendant is entitled to rely as a defence. Neither the plaintiff nor the defendant owned the land; both were there by the common licence of the owner. To entitle the plaintiff to maintain trespass he must have exclusive possession of the crop. He did not have exclusive possession; he only had a partial right to possession, for he was bound to let his sheep consume one half of the crop on the land. It must be conceded that if a person has the right of pasturage demised to him he has the right to bring an action for trespass: *Coverdale* v. *Charlton* (3); but in the present case the plaintiff had not an absolute and exclusive right and therefore had not sufficient possession to maintain the action. In Chitty on Pleading, 7th ed., vol. 1, pp. 198, 199, it is said: "Whenever there is an exclusive right of possession in corporeal property, trespass may be supported, though the party has not the absolute right to the soil, or the whole property therein; as if a person have an exclusive right to cut turf and peat, or cut thorns, he may support trespass quare clausum fregit, and for cutting the turf." Exclusive possession in that passage is obviously put upon the person's right to cut and remove the turf and peat.

Hawke, K.C., in reply. The condition that the plaintiff could only remove half the crop of turnips from the field does not disentitle him to maintain trespass: *Burt* v. *Moore.* (4)

LAWRENCE J. stated the facts and continued: Mr. Foote, on behalf of the defendant, has contended that an action of trespass will not lie because the plaintiff was not, he says, in the exclusive possession

(1) (1809) 1 Taunt. 529.
(2) (1874) L. R. 10 C. P. 10.
(3) (1878) 4 Q. B. D. 104.
(4) (1793) 5 T. R. 329.

of the turnip crop. That contention is founded upon the fact that in the sale of the turnips there was a proviso that the plaintiff should only remove one half of the crop, the other half having to be consumed on the land. Mr. Foote does not dispute that if the whole crop of turnips could have been removed by the plaintiff he would have had such exclusive possession as would entitle him to maintain trespass. That, in my judgment, is clearly the law, and in my opinion the proviso in the sale of the turnips to the plaintiff does not prevent the application of that principle of law to the present case. The plaintiff's possession is none the less complete and exclusive because as to part of the crop the plaintiff is to exercise his right in a particular way, namely, by consuming the turnips on the land instead of removing them. The point put forward by Mr. Foote is very ingenious, but I do not think it is sound. I think the plaintiff had a temporary interest in the soil whether he had the right to remove the turnips or only to have them consumed on the ground. This, I think, becomes clearly apparent if the defendant's position is looked at. In respect of the pasture field, the defendant could have removed the grass or he could have agisted cattle thereon; he had the entire field left to him, and he could maintain trespass in respect of any injury to the grass. I come to the conclusion that trespass will lie in respect of the damage to the turnips by the defendant's sheep.

As the plaintiff has undertaken to make no claim for damage done on the first day, because on that day it seems that the gate between the two fields had been left open by the plaintiff or his servant, it is unnecessary to say anything as to the damage done on that day except this, that if the gate was left open that would be evidence in support of a plea of leave and licence as to any damage done on that day. The county court judge seems to have thought that as some of the sheep by getting into the turnip field on the first day knew of the existence of the turnips there, the defendant's duty as to keeping his sheep on his own close was altered. That is not a correct view of the law. The defendant's duty to keep his sheep on his own close existed just as much after as before their first visit to the turnip field. If (as might have been the case) such acts had been done by the plaintiff as to make it inevitable that the entry would be repeated, then probably

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Lawrence J.

the plea of leave and licence would apply. But it does not apply merely because the sheep had acquired knowledge of the existence of the turnips. The sheep may be more likely to trespass, but they must still be kept in their own field by their owner. In my opinion the county court judge came to a wrong conclusion and the case must go back to him to assess the damages suffered by the plaintiff on the second and third days.

ATKIN J. I agree. It appears to me that by reason of the right the plaintiff acquired in respect of the crop of turnips he had such exclusive possession of the crop as entitled him to bring trespass. There is a good deal of authority in favour of that view, most of it being founded on the following passage in Coke on Littleton, 4b: "If a man hath 20 acres of land, and by deed granteth to another and his heires vesturam terrae, and maketh livery of seisin secundum formam chartae, the land itselfe shall not passe, because he hath a particular right in the land: for thereby he shall not have the houses, timber trees, mines, and other reall things parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespasse quare clausum fregit. The same law, if a man grant herbagium terrae, he hath a like particular right in the land, and shall have an action quare clausum fregit." It is impossible to distinguish the exclusive right in a crop of turnips from the exclusive right in a crop of corn. The plaintiff had clearly an exclusive right to the turnips, and that is not affected by the fact that according to the contract there is a limitation on the right to dispose of the crop when it is severed or gathered. It appears to me, therefore, that the condition that half of the crop should be consumed on the land in no way affects the plaintiff's exclusive right of possession although it limits the mode of enjoyment of the possession. If the plaintiff has a right to bring an action it is plain that he has a right to recover the damage he suffered by reason of the defendant's sheep trespassing on his close. That is quite independent of the duty to fence. That proposition was not disputed before us, and therefore it is unnecessary to deal with that passage in the county court judge's judgment in which he appears to put forward a different view. As to the damage done on the second and third

days, it was not, in my opinion, a necessary consequence of the gate being left open on the first day. As to the damage on the first day, it is unnecessary to say anything, as the plaintiff now agrees to make no claim in respect of it. In the assessment of the amount to which the plaintiff is entitled the damage done on that day will therefore be taken off. The appeal therefore succeeds, and there will be judgment for the plaintiff for an amount to be ascertained by the county court judge, the plaintiff making no claim for the damage done on the first day.

Appeal allowed.

Solicitors for plaintiff: *Kenneth Brown, Baker, Baker & Co., for Dunn & Baker, Exeter.*

Solicitors for defendant: *Mann & Crimp, for Kitsons, Hutchings, Easterbrook & Co., Torquay.*

J. S. H.

EDGELOW *v.* MACELWEE.

1917

Nov. 27, 29.

Money-lender — Solicitor lending Money — Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51).

A person who, while bona fide carrying on the business of a solicitor, makes a practice of advancing money to clients and others is required to be registered under the Money-lenders Act, 1900, unless his primary object in lending the money is to maintain or increase his professional business and earn professional fees.

TRIAL of action before McCardie J. without a jury.

The action was brought to recover a sum of 80*l.* due on a cheque given for money lent. The defence was that the plaintiff, who was a solicitor, carried on the business of a money-lender and was not registered under the Money-lenders Act, 1900. The facts and contentions sufficiently appear from the judgment.

Stuart Bevan, for the plaintiff.

Arthur Powell, K.C., and *H. W. Wickham*, for the defendant.

Cur. adv. vult.

Nov. 29. MCCARDIE J. read the following judgment:—This action raises points of general interest under the Money-lenders Act, 1900. The plaintiff claims upon a cheque for 80*l.* given by

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the defendant for moneys lent by the plaintiff. The defendant repudiates liability on the ground that the plaintiff is an unregistered money-lender. The facts are unusual. The question at issue is important. The defendant contends that the plaintiff combined the business of an unregistered money-lender with the practice of his profession as a solicitor and that the latter vocation has cloaked an illegal trade.

Before I consider the circumstances it is desirable to state the legal principles which govern the case. The Money-lenders Act, 1900, precludes an unregistered money-lender from enforcing any contract made in the course of his money-lending business: see *Bonnard* v. *Dott* (1); *In re Robinson's Settlement.* (2) Sect. 6 of the Act defines a money-lender as follows: "The expression 'money-lender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business." A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindliness are not the bases of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word "business" imports the notion of system, repetition, and continuity: see *Newton* v. *Pyke* (3), per Walton J.; *Fagot* v. *Fine* (4), per Bankes and Lush JJ.; and *Newman* v. *Oughton* (5), per Ridley and Avory JJ. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree. But if it appears that the transactions are sufficiently numerous to require the inference that a system and business of money-lending is carried on, then the requirements of the definition in s. 6 of the Act of 1900 are fulfilled and the question arises whether the case falls within the exceptions indicated in that section. Those exceptions appear in heads (*a*), (*b*), (*c*), and (*d*) of s. 6. The only exception

(1) [1906] 1 Ch. 740.
(2) [1912] 1 Ch. 717.
(3) (1908) 25 Times L. R. 127.
(4) (1911) 105 L.T. 583.
(5) [1911] 1 K. B. 792.

relevant to the present case is (*d*) : " Any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money." That exception has been discussed in several cases. It was considered by Farwell J. in *Litchfield* v. *Dreyfus*. (1) With the actual decision in that case I agree, though I think that the dictum of the learned judge, where he says " Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided they are from his point of view eligible," may require future consideration. The exception was also considered by Phillimore J. in *Furber* v. *Fieldings, Ld.* (2) The facts in that action were unusual. The loans were of a particular character and were made upon a particular class of security. No loans were ever made upon mere personal security. It is not necessary to test the conclusion of Phillimore J. upon the peculiar circumstances of that case, but I desire to say that his decision represents in my view the furthest limits of exception (*d*). The decision of Horridge J. in *Brown* v. *Maisel* (3) also depended on particular facts, and was, if I may respectfully say so, clearly correct. The case of *Fagot* v. *Fine* (4) may also be referred to. But in my opinion no system of loans will fall within exception (*d*) unless such loans are in substance and actuality directly incidental to the business which is the primary object and pursuit of the person who makes the loans. The Act of 1900 was a severe but beneficial measure. Its object must always be remembered. On the one hand a legitimate business must not be checked if the lending of money is reasonably and bona fide incidental to its successful prosecution. On the other hand the law must not permit an apparently legitimate business to be made the mere cloak and pretext for the unlawful trade of an unregistered money-lender. Evasion of the Money-lenders Act should be repressed, and judges, I think, should be astute to recognize the possibilities of ingenious subterfuge and subtle device. If Farwell J. be right when he said in *Litchfield* v. *Dreyfus* (5) that money-lending was a perfectly respectable form of

(1) [1906] 1 K. B. 584, 589.
(2) (1907) 23 Times L. R. 362.
(3) (1912) *The Times*, March 4.
(4) 105 L. T. 583.
(5) [1906] 1 K. B. 584, 590.

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business, then the less reason exists for abstaining from registration where the circumstances are ambiguous and the legal position is in doubt. I may add that although the business of a scrivener is not within the ordinary scope of a solicitor's business (see *Harman* v. *Johnson* (1)), yet it is well recognized that a solicitor may properly and frequently does advance money to third persons. But such advances should be so made as to satisfy the Court (*a*) that the moneys are lent for the primary purpose of maintaining or increasing his professional business and the resultant professional fees, and (*b*) that the circumstances preclude the inference that his function is that of a money-lender who conceals his trade under the guise of professional legal activity. If the Court comes to the conclusion that the solicitor carries on the actual business of a money-lender as well as the vocation of a solicitor, then his professional calling will not free him from the requirement of registration under the Act of 1900. A man may follow concurrent callings. If one of such callings be the trade of a money-lender, then the Act must be complied with.

I proceed to consider the facts of the present case. The plaintiff gave evidence. He was fully cross-examined. His answers and demeanour were alike unsatisfactory. It appears that at the end of 1910 he had been found guilty of misconduct as a solicitor and had been punished by suspension for two years. After the period of suspension he recommenced practice, but I infer that the events of 1910 would not tend to the creation of a satisfactory clientèle. I am satisfied that from 1912 onward he habitually lent money. I am satisfied also that his loan transactions were in no way confined to clients. During the years 1915—1917 he issued no less than seventeen writs in respect of bills or cheques he had discounted or moneys he had advanced. It is a significant circumstance that the plaintiff failed to produce any book of account showing the names of the borrowers, the amounts advanced, or the interest charged. He told me that he had forgotten the rates charged by him for financial accommodation. Upon none of the writs issued by the plaintiff since 1913 was there any claim for professional costs. Nor is there anything before me to show that he ever sent a bill of costs to any of the persons who were named as the defendants in such writs.

(1) (1853) 2 E. & B. 61, 66.

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No entries were produced to me to indicate that any of such persons were entered in the books as professional clients. Every circumstance points to the conclusion that the plaintiff was systematically engaging in ordinary money-lending transactions, and the appellation of " clients " was given (if at all) to needy and adventitious borrowers. It is noteworthy that although some of the borrowers are said to be clients of the firm of solicitors of which the plaintiff was a partner, yet the writs were all issued by the plaintiff in his own name. In several of the transactions immediately involved in the counter-claim in the present action the plaintiff did not even employ cheques for the purpose of making the advances. He lent in bank notes to the extent of several hundred pounds, and he stated that such bank notes were " family moneys " which he had kept in a safe in his office. No record of the dealings with the notes was made in any book. In the year prior to the plaintiff's suspension, namely 1909, he issued no less than nine writs in respect of money lent or of bills of exchange or cheques discounted by him. In any view the plaintiff after his suspension resumed the trade of money-lending which he had carried on before. After a careful consideration of the whole evidence I am satisfied that at all material times the plaintiff was a money-lender, that his business as a money-lender was carried on apart from any bona fide motive or object of professional fees or legal practice, and that his vocation as a solicitor, so far as he carried it on, was used as a mere disguise in order to give a colourable professional appearance to the course of ordinary money-lending transactions which he combined with his practice. It follows that the action fails.

Judgment for the defendant.

Solicitors for plaintiff : *Richard Davies & Son.*
Solicitors for defendant : *C. F. Appleton & Co.*

J. F. C.

1917
Nov. 26;
Dec. 3.

BELFAST ROPEWORK COMPANY, LIMITED *v.* BUSHELL.

[1917 B. 1205.]

Carrier—Haulage Contractor—Whether liable as Insurer—Option to refuse Goods for Carriage.

The defendant described his business as that of an automobile engineer and haulage contractor. He owned two lorries intended for sale. With these and others which he hired when necessary he carried sugar from Liverpool to Manchester. At Manchester he invited offers of goods of all kinds, except machinery, for carriage to Liverpool and other places at charges varying with the state of his business. These offers he accepted or rejected according as the rate, route, and class of goods were or were not satisfactory.

The defendant through an agent made a contract with the plaintiffs to carry certain hemp belonging to them from Manchester to Liverpool. In the course of the transit the hemp was damaged by fire without negligence of the defendant:—

Held, that inasmuch as he reserved to himself the right of accepting or rejecting offers of goods for carriage from Manchester to Liverpool he was not a common carrier of such goods and consequently not liable.

TRIAL of action before Bailhache J. without a jury.

The action was brought to recover damages from the defendant in respect of the partial loss by fire of forty-three bales of hemp belonging to the plaintiffs which caught fire while being carted by the defendant from Manchester to Liverpool. The fire was not due to any negligence of the defendant. The ground of the claim was that the defendant was carrying the goods as a common carrier. The defendant denied that he was a common carrier.

The following statement of the facts is taken from the written judgment of the learned judge:—The defendant is an engineer. After being discharged from the Army he started business in Liverpool. He traded as Oliver Bushell & Co., and on his invoices described his business as that of automobile engineers and haulage contractors. He had an automobile agency and sold a few heavy motors, but the scarcity of petroleum prevented the development of that part of his business. He had two motor lorries with which he did his carrying work. He ran these lorries partly as a means of

advertising his motor business and partly to make money by them until a purchaser could be found for them. They were at all times for sale. His carrying business was considerable, and when he had more goods to carry than his two lorries could manage he hired lorries from other persons or contracted with them to carry for him. He did so in this instance.

The mainstay of his carrying business was the conveyance of sugar from Messrs. Tate's premises in Liverpool to their customers in Manchester and the surrounding district. He seems to have agreed a rate of 12*s.* 6*d.* per ton for that with Messrs. Tate, but the rate was paid by their customers, who for the most part accepted the charge as reasonable and paid without making any special bargain themselves. He carried practically nothing but sugar from Liverpool. From Manchester to Liverpool he carried as a rule all kinds of Manchester goods except machinery.

At first he got his orders to carry through a traffic agent who submitted offers to him which he accepted or refused as suited him, but he soon got into touch with customers direct and dispensed with the traffic agent's services. Customers would ask him to carry their goods from Manchester to Liverpool, and he generally did so, though he has refused to carry when the offers did not suit him. His refusals include cotton to an undesirable destination, acetylene cylinders, and ship's stores. If he was carrying sugar to Manchester and had no return goods he would through his clerk give the lorry driver a list of likely customers to call upon and so fill up for the home journey. The lorry drivers do not appear to have been forbidden to take goods from casual consignors, but there was no evidence of any instance in which they had done so. The defendant was prepared to entertain paying orders for carriage to any destination. He has carried goods to London and York and frequently to such places as Stalybridge, Stockport, and Oldham. There was no regular or tariff charge except for sugar. The charges largely depended on the state of his business and upon the customers' need of the goods. When getting orders through the traffic agent the defendant did not trouble about the name of the customer and accepted or rejected orders according as the rate, route, and class of goods were or were not satisfactory.

So far as the particular transaction between the plaintiffs and the

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defendant is concerned, it was the first and was the subject of a bargain made between the plaintiffs and one Jevons to whom the defendant paid a commission.

R. A. Wright, K.C., and *Le Quesne*, for the plaintiffs.

Greer, K.C., and *Hanbury Aggs* (for *P. K. Chappell*, serving with His Majesty's Forces), for the defendant.

The arguments of counsel sufficiently appear from the judgment.

Dec. 3. BAILHACHE J. delivered a written judgment as follows, omitting the facts stated above:—The liability of the defendant depends solely upon whether he was a common carrier or not. The question whether a man is a common carrier or not is one of fact. A man may be a common carrier without so styling himself, and in this case the question is whether the facts as narrated above make the defendant a common carrier.

There seems to be a general agreement, whether one consults the authorities or the text-books, that to make a man a common carrier he must carry as a public employment; he must carry for all indifferently; he must hold himself out as ready to carry for hire as a business and not as a casual occupation pro hac vice. He is sometimes described as a person who undertakes for reward to carry the goods of such as choose to employ him from place to place. To this I think it would be safe to add the words "at a reasonable rate." All other carriers by land are private carriers. There is, I believe, no class of land carriers such as lightermen, of whom it is said in the case of *Liver Alkali Co.* v. *Johnson* (1) that they are not common carriers but carry subject to the liabilities of common carriers—the distinction between them and common carriers being that they are not liable to indictment or action for refusing to accept goods for carriage as common carriers are. In Mr. Macnamara's Law of Carriers by Land, 2nd ed. (1908), p. 17, it is stated that proprietors of wagons, carts, &c., who, as a common and public employment for hire, carry goods from one town to another, and from one part of a town to another, are common carriers. For this proposition he cites *Gisbourn* v. *Hurst*. (2) In that case, as I read it, the defendant was not a common

(1) (1874) L. R. 9 Ex. 338. (2) (1709) 1 Salk. 249.

carrier, and the Court held that, although he was a private carrier, goods delivered to him to carry were not liable to distress and that in respect of that privilege he was in the same position as a common carrier, immunity from distress being the privilege of the trader and not of the carrier. I think that the head-note is misleading. He also cites *Hyde* v. *Trent and Mersey Navigation Co.* (1) In that case there was no dispute that the defendants were common carriers, but the question was whether they were liable for damage by fire in a warehouse in which the goods were placed in course of transit. Mr. Macnamara refers in a note to *Ingate* v. *Christie.* (2) There is a foot-note to that case, on p. 62, containing a passage from Story on Bailments. The defendant in that case was a lighterman, and Alderson B., in giving judgment, said (3): "Story J. is a great authority, and if we would but adhere to principle, the law would be, what it ought to be, a science. There may be cases on all sides, but I will adhere to principle if I can. If a person holds himself out to carry goods for everyone as a business, and he thus carries from the wharves to the ships in harbour, he is a common carrier."

The two cases relied upon as supporting Mr. Macnamara's proposition do not appear to me to do so, and *Ingate* v. *Christie* (2) is, as I have said, a case of a lighterman. True, Story J. in the passage cited in the note to that case points out that it is difficult to distinguish between a lighterman and a carman, but unfortunately, or fortunately, I am not sure which, our law is not a science. In *Brind* v. *Dale* (4) Lord Abinger C.B. expressed the opinion that a town carman whose carts ply for hire near the wharves and who lets them out by the hour, day, or job is not a common carrier, and the jury so found. In that case it appeared that the defendant was the owner of a great number of carts which plied at particular stations to convey goods from one place to another. I doubt whether Mr. Macnamara's statement can be supported without considerable qualification. I have considered it and the authorities cited for it thus closely because it was relied on by the plaintiffs as conclusive of this case.

The more recent decisions do not throw much light upon the

(1) (1793) 5 T. R. 389.
(2) (1850) 3 Car. & K. 61.
(3) 3 Car. & K. 63.
(4) (1837) 8 Car. & P. 207.

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present case, but they show a tendency rather to restrict than to extend the class of common carriers. In *Scaife* v. *Farrant* (1) the defendant, a furniture remover, had undertaken the risk of breakages, if any, not exceeding 5*l.* on any one article. The Court held that this special contract excluded any question of liability as a common carrier, a somewhat curious reason to us who know the extent to which common carriers now limit their liability by special contracts. (2) In *Electric Supply Stores* v. *Gaywood* (3), again a case of a carman and furniture remover, the defendant was held not to be a common carrier upon the ground that he did not hold himself out to carry furniture for anybody who might bring it to him on any reasonable terms that might be offered. In *Watkins* v. *Cottell* (4) it was admitted that the defendant, again a furniture remover, was not a common carrier, but it was sought to make him liable upon the ground that in carrying the goods he was exercising a public employment and so impliedly took upon himself the liability of a common carrier. This was an attempt to apply the decision of *Liver Alkali Co.* v. *Johnson* (5) to a carrier by land, to treat the law as a science; but it failed.

One would suppose that there ought to be some simple test by which it could be determined without difficulty whether a man is a common or a private carrier, but now that the old idea that to be a common carrier by land a man must carry between fixed termini, or at any rate within defined districts, has been abandoned, I confess that I find considerable difficulty in framing the question the answer to which would be conclusive one way or the other. If one asks whether a carrier is prepared to carry for all who choose to employ him, the answer would in almost all cases be Yes. Every carrier, common or private, who seeks employment for his lorries or carts desires all persons who have goods to be carried to come to him. It is only to the extent to which such persons resort to him that his business flourishes. If one asks whether a carrier is pre-

(1) (1875) L. R. 10 Ex. 358.

(2) This practice was sanctioned by the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68). Before that Act the effect of special terms or a special contract upon the liability of a carrier was a vexed question. See *Peek* v. *North Staffordshire Ry. Co.* (1863) 10 H. L. C. 493 et seq., per Blackburn J.

(3) (1909) 100 L. T. 855.

(4) [1916] 1 K. B. 10.

(5) L. R. 9 Ex. 338.

pared to carry at a reasonable rate the answer would again be Yes. No carrier, common or private, would profess to charge unreasonable rates. If one asks whether a carrier is bound to carry at any reasonable rate that may be offered, that is only another way of asking whether he is a common carrier. The same difficulty presents itself if one asks whether he would be liable to indictment if he refused so to carry. To answer that question it must first be determined whether he is a common carrier or no.

For the purposes of my present decision I fall back upon this question, Did the defendant, while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements? Upon the facts as found by me I answer that question in the affirmative, and in my opinion that answer shows that he is not a common carrier. After all the question is one of fact, and I am not sure that this elaborate discussion of text-books and cases and questions and answers is very useful. Lord Abinger C.B. in *Brind* v. *Dale* (1) had the help of a jury, and he said to them: "I give you no direction in point of law, but I put it to you as a question of fact—Did the defendant take the goods as a common carrier?" I sit as judge and jury, and I think as a judge I cannot do better than put that question in the same form to myself as a jury. To the question so put I, as the jury did in that case, answer No. Upon that finding I proceed as a judge to give judgment for the defendant with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendant: *Pritchard, Englefield & Co.*

(1) 8 Car. & P. 207, 212.

W. H. G.

Referred to. R. *v.* KELLY. [1950] 1 All E.R. 806.

1918
Jan. 21, 25.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* WAKEFIELD.

Criminal Law—Mistrial—Personation of Juryman—Venire de novo.

The appellant was tried for, and convicted of, rape. Shortly afterwards it was discovered that one of the jurors summoned to serve on the jury which tried the appellant was personated by his bailiff, who served on the jury although not in fact qualified to do so. On appeal:—

Held, that there had been a mistrial and that a venire de novo should be awarded.

APPEAL from a conviction at the Central Criminal Court.

The prisoner was tried on December 13, 1917, on a charge of rape, convicted, and sentenced to three years' penal servitude. Subsequently it was discovered that a man named Toley, who had been summoned to serve on the jury, did not appear but was personated by his bailiff named Clark, who served on the jury although he was not in fact qualified to act as a juryman.

The prisoner appealed.

St. John Macdonald, for the appellant.

Bryan, for the Crown.

[*Dovey* v. *Hobson* (1), *Rex* v. *Tremearne* (2), *Reg.* v. *Mellor* (3), Criminal Law Act, 1826 (7 Geo. 4, c. 64), s. 21, *Rex* v. *Baker* (4), *Rex* v. *Golathan* (5), and *Rex* v. *Ingleson* (6) were referred to.]

Cur. adv. vult.

Jan. 25. The judgment of the COURT (Darling, Lawrence, and Sankey JJ.) was read by

DARLING J. The appellant was on December 13, 1917, tried at the Central Criminal Court before Avory J. and convicted of rape.

(1) (1816) 6 Taunt. 460.
(2) (1826) 5 B. & C. 254.
(3) (1858) Dears. & B. 468, 473, 474.
(4) (1912) 7 Cr. App. R. 217.
(5) [1915] W. N. 45; 11 Cr. App. R. 79.
(6) [1915] 1 K. B. 512.

He was sentenced to three years' penal servitude. Subsequently it was discovered and brought to the notice of the Court that a man named Toley had been summoned to serve on the jury. Toley did not answer to his name, but a man named Clark did, and served on the jury to the end. Clark was not qualified to sit on the jury at all. The real question to be determined here is whether this amounted to a mistrial. We think it did.

A defendant is entitled to be tried before a duly authorized judge and twelve men qualified to be jurors to try him. Many cases have decided that mere irregularity in calling together the jury—mere misnomer of a juryman—is not sufficient to avoid the proceedings. But this case is not of that character, for it is admitted by the Crown that Clark, who presented himself when Toley, a qualified juror, was called, and who served in his place, was not upon the panel and was not qualified to serve as a juror. Our judgment is limited to this case, where all these circumstances apply. But here Toley, a man duly summoned and also qualified to serve, was personated by a man who was in neither case, and so the accused was deprived of his legal right of peremptory challenge and of trial by twelve qualified persons.

In *Reg.* v. *Mellor* (1) are collected practically all the authorities bearing upon this question. In this case, as Lord Campbell C.J. said of that one, "there never were more than eleven jurymen whom the law could recognise." His Lordship added: "Upon principle, therefore, there seems to me to have been a mistrial, as much as if all the twelve jurors who served had been different persons and had different names from the jurors called by the clerk of assize, in which case the prisoner would have been entirely deprived of his right of challenge."

In *Reg.* v. *Mellor* (1) the majority of the judges composing the Court would appear to have been of opinion that venire de novo should have been granted, but to have held that the Court for Crown Cases Reserved had not statutory power to award it, and it does not appear to us that the judges who affirmed the conviction in *Mellor's Case* (1) would not in this one have ordered the case to be tried again had they possessed the powers of this Court of Criminal Appeal. That we have such power has been more than

(1) Dears. & B. 468, 473, 474.

1918

REX v. WAKEFIELD.

once affirmed in this Court: see *Rex* v. *Baker* (1); *Rex* v. *Golathan* (2); and this power has been exercised.

Application was made to us to allow the accused to call evidence not available at the trial and which might put a different complexion on this case. It is not necessary for us to deal with this application now, as that evidence can be called at the trial which will be the consequence of this judgment.

The conduct of Clark and Toley may well form the subject of investigation by the Director of Public Prosecutions, for personation of a duly summoned juryman may lead to the doing of great harm and may amount to an attempt to pervert the course of justice and so be punishable as a misdemeanour at common law.

Appeal allowed. (3)

Solicitor for Crown: *Director of Public Prosecutions.*

(1) 7 Cr. App. R. 217. (2) [1915] W. N. 45; 11 Cr. App. R. 79.
(3) On the retrial the prisoner was acquitted.

J. S. H.

CLAYTON *v.* PONTYPRIDD URBAN DISTRICT COUNCIL.

1917
Nov. 29.

Gasworks— Supply of Gas to Consumer—Obligation of Undertakers to fix Gas Meter—Gasworks Clauses Act, 1871 (34 & 35 *Vict. c.* 41), *s.* 11 — *Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61).

The Gasworks Clauses Act, 1871, which by s. 11 imposes on gasworks undertakers the obligation of supplying gas to owners and occupiers who require a supply, and of laying the necessary pipes, and by s. 14 obliges them to supply any meters which they require the consumers to use, also impliedly imposes on them the obligation of fixing the meters.

The defendants were the gasworks undertakers in their district, A house in the district had been empty for some time and the gas had been cut off. On its becoming occupied the occupier required the defendants to supply the premises with gas. They sent one of their servants to reconnect the pipes. While he was engaged in fixing the meter an explosion of the gas occurred through his negligence, whereby the plaintiff, a person employed on the premises by the occupier, was injured. The action was not commenced until more than six months after the accident :—

Held, that the defendants in fixing the gas meter were acting in the execution of their statutory duty, and that the Public Authorities Protection Act, 1893, afforded a defence.

Further Consideration from Cardiff Assizes, after a trial before Lush J. and a jury.

A certain house in Taff Street, Pontypridd, which had been unoccupied for some months and from which the gas had been cut off, was taken by a Mrs. Reinecke with a view to her occupying it. She gave notice to the defendants, who are the gasworks undertakers for the urban district of Pontypridd, that she required a supply of gas to the premises. She then entered into an agreement with the defendants to have the gas supplied through what is known as a prepayment meter, and to pay for the gas and for the hire and maintenance of the meter, pipes, stoves, and fittings at the rate of 1*s.* for every 240 feet, depositing money in the automatic prepayment meter provided by the gas department. The defendants sent their plumber to make the necessary connections and to fix a meter. In the course of fixing the meter an escape of gas occurred which resulted in an explosion, whereby the plaintiff, a woman who was employed by Mrs. Reinecke to get the house ready for her reception, was injured. The jury found that the explosion was due to the

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negligence of the plumber. The plaintiff, not realizing for some time that her injuries were as serious as they turned out to be, neglected to commence her action until more than six months after the occurrence of the accident. The defendants relied for their defence upon the Public Authorities Protection Act, 1893, by s. 1 of which "Where . . . . any action . . . . is commenced . . . . against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, ... the action . . . . shall not lie . . . . unless it is commenced within six months next after the act, neglect, or default complained of."

Ivor Bowen, K.C., and *Marlay Samson*, for the plaintiff. The act of the defendants' plumber in fixing the meter, in the course of which the negligence complained of occurred, was not an act done in the execution or intended execution of any Act of Parliament or of any public duty. This question turns upon the provisions of the Gasworks Clauses Act, 1871. By s. 11 of that Act the undertakers are required to furnish a sufficient supply of gas to the owners or occupiers of premises requiring a supply, and to furnish and lay any pipe that may be necessary for such purpose. They are by s. 13 empowered to require consumers to use meters, and by s. 14 they "shall supply to any owner or occupier of premises within the limits of the special Act requiring the same a meter for registering gas supplied by them." But the Act does not impose any obligation on the undertakers to fix the meters so supplied. There is nothing to prevent the consumer employing her own plumber for that purpose. The meter stands on a different footing from the pipes, for by s. 17 the consumer is to keep the meter in proper order. Moreover, the meter in question was a prepayment meter, and there is no power in the consumer to compel the undertakers even to supply a prepayment meter at all. It is purely a matter of agreement between the parties. And if the act complained of is committed in the course of the discharge by a public authority of a contract into which they had entered voluntarily and without obligation the Public Authorities Protection Act affords no defence: *Bradford Corporation* v. *Myers*. (1)

(1) [1916] 1 A. C. 242.

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Llewelyn Williams, K.C., and *Stanley Evans*, for the defendants. The defendants were under an obligation, first, to supply the gas; secondly, to provide and lay the pipes; and, thirdly, to supply a meter of some kind, without which the amount to be paid by the consumer for the gas supplied cannot be determined. The defendants have to make the necessary connections, and as the meter is only part of the system of supply the statute imports an obligation upon them to fix the meter as well as the pipes. The accident therefore happened in the course of the execution by them of their statutory duty.

Ivor Bowen, K.C., replied.

LUSH J., after stating the facts, proceeded as follows:—The defendants among their defences have pleaded the Public Authorities Protection Act, 1893, and they contended that as the action was not commenced till more than six months after the negligent act complained of the plaintiff is not entitled to recover. It was agreed for convenience at Cardiff that, in case any question might arise which was partly law and partly fact, I should have power to decide any question of fact necessary to enable me to determine whether or not the case fell within the provisions of that Act. The relevant section of that Act, s. 1, is as follows: [He read the section.] The question whether that section applies to this case depends on whether the defendants, in doing the act which the jury found was negligent, were acting "in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority." It is said by Mr. Bowen on behalf of the plaintiff that the defendants were not so acting, because they, as the gas undertakers, were under no statutory obligation to fix this meter, and it was in the course of fixing the meter that the negligent act complained of was done. Mr. Llewelyn Williams, on the other hand, contends that the defendants were bound under the Gasworks Clauses Act, 1871, not only to supply the meter but to fix it and make all the necessary connections to enable the occupier to enjoy the gas which she had required. Mr. Bowen relies on the decision of the House of Lords in *Bradford Corporation* v. *Myers*. (1) In that case the corporation were authorized, just as the district council were here,

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to carry on the undertaking of a gas company. They were bound to supply gas to the inhabitants of the borough, and were also empowered, though not obliged, to sell the coke that was produced in the manufacture of the gas. They sold some coke to the plaintiff, and owing to the negligence of the corporation's servant the coke, instead of being shot into the cellar, was shot through the plaintiff's shop window. For the damage so caused the plaintiff brought the action more than six months after the act complained of, and the question was whether the Public Authorities Protection Act, 1893, operated to bar the action. The House of Lords held that it did not, upon the ground that although the corporation were empowered to sell the coke they were under no statutory duty to sell it, and certainly under no statutory duty to sell it to the plaintiff. They had a right to make a contract with the plaintiff, but it was a right which they might exercise or not as they thought fit, and, inasmuch as the negligence complained of was committed in the course of doing an act which the corporation were under no obligation to do, the damage was not caused by an act done "in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority." Now is it true in the present case that the defendants in fixing this meter were merely exercising a right which they might, if they had thought fit, have declined to exercise, or were they in fact doing what they were obliged by statute to do? I do not think it is possible, nor do I think it is right, to enter into the subtle refinement which I have been invited to enter into by Mr. Bowen. One must look at the substance of the matter and see whether in substance the defendants were not discharging a duty which they were under towards the plaintiff. It is clear that they were under a duty to provide gas to these premises; it is clear that they were under a duty to provide and lay the pipes that were necessary to enable the occupier to enjoy the gas; it is clear that they were obliged to supply a meter; and, although the statute does not in express terms impose on them the duty of fixing the meter, I think that it was intended that they should be under a duty to fix the meter just as much as they were under a duty to fix the pipes. The gas could not be enjoyed without the one any more than without the other. I come, therefore, to the conclusion that the defendants are entitled to succeed. It is unfortunate for the

plaintiff, and particularly for the reason that for several months she did not know that her injuries were sufficiently serious to make an action necessary. There must be judgment for the defendants.

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Judgment for the defendants.

Solicitors for plaintiff: *Helder, Roberts & Co., for W. R. Davis & Co., Pontypridd.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for Colenso Jones, Pontypridd.*

J. F. C.

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Nov. 20; *Dec.* 18.

Trust—Husband and Wife—Purchase of Property by Husband in Wife's Name—Intention to defeat Creditors—Presumption of Gift to Wife—Rebuttal of.

A husband took a lease of land in his wife's name and built a house upon it with his own money. He used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him:—

Held, that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, and that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud.

APPEAL from the Kingston County Court.

The action was by a husband against his wife for a declaration that she was trustee for him of certain leasehold property. The plaintiff while living with the defendant took a lease of certain land at Thames Ditton in her name, and built a house on it with his own money. He was at that time in debt to money-lenders, and with his wife's knowledge and connivance put her forward as the lessee, with the object of protecting the property from his creditors. The plaintiff and defendant subsequently separated, and on her refusal to assign the lease to him he brought the action. The defendant had never entered into any agreement to hold the property as trustee for the plaintiff, and claimed that, having regard to the fact

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that the relationship between them was that of husband and wife, the presumption was that the conveyance was intended as a gift to her. The only fact relied on by the plaintiff as tending to rebut that presumption was that of the above-mentioned scheme to defeat his creditors. The county court judge made the declaration asked for. The defendant appealed.

G. M. Hildyard and *H. C. Fenton*, for the appellant. Where a husband purchases property and conveys it to his wife, the presumption is that he intended it to be for her benefit. There is no evidence here on which the judge below could properly find that that presumption was rebutted. The only finding of the judge which tended to negative the intention of an advancement to her was that he wanted to use her name as a shield against his creditors. But that is a matter which the Court will not allow him to set up. A man who comes into Court to ask for the equitable relief of a declaration of trust cannot be heard to assert his own fraud. And it makes no difference that the wife was a party to the fraudulent design. If both parties share in the fraud the Court will simply refuse to interfere, the result of which is that the presumption of advancement remains. [They referred to *Childers* v. *Childers*. (1)]

Ganz, for the respondent. The wife ought not to be allowed to set up the presumption of an advancement where she was equally guilty with the husband. Where the guilt of both parties is equal the Court should decide according to the true facts; and the real intention was that there should be a resulting trust in the husband's favour.

Cur. adv. vult.

Dec. 18. The judgment of the COURT (Lawrence and Lush JJ.) was read by

LUSH J. The plaintiff in this case brought an action against his wife in the Kingston County Court for a declaration that she was trustee for him of certain leasehold property. The learned judge decided in his favour, and the defendant has appealed.

The facts as proved by the plaintiff in his evidence in chief were these: He and his wife, who have recently separated and are living

(1) (1857) 1 De G. & J. 482.

apart, were at one time living together at Teddington. The plaintiff was then desirous of acquiring some leasehold land at Thames Ditton and building a bungalow on it. He took the lease, not in his own name, but in that of his wife, and built the bungalow. There was an option in the lease to extend the term, which was exercised. The plaintiff, the husband, paid all the moneys that were payable both in respect of the lease and extension and of the erection of the bungalow, the wife having no means of her own. He said that there was no conversation as to these matters between him and his wife. She "simply signed" the documents. His reason for putting forward his wife's name was that he had run into debt and had borrowed from money-lenders "to get out." When she asked why she was signing all these documents he replied, "To raise the wind; to get out of a hole." After they separated he called upon her to reassign the premises to him, when she refused, claiming that the property was hers. The defendant's counsel at the close of this evidence submitted that there was no case on these grounds—namely, that there was no evidence of any agreement that the wife should acquire the property as trustee, and that there was a presumption of a gift. The learned judge refused to nonsuit, and the defendant's counsel, without prejudice to his submission, cross-examined the plaintiff and called the defendant as a witness. The plaintiff admitted that, when called upon to pay taxes in respect of the bungalow, he refused, saying that it was his wife's property. When asked why he had taken the lease in her name he said it was because his "affairs were not very bright," and he added, "I thought if it was put in my wife's name the property might be saved. It may have been an idea to avoid liabilities which might come on me." The wife's case, on her evidence, was that she had never made any agreement to hold the property as trustee. The plaintiff had said that he would build the bungalow for her, and had suggested that if he got into difficulties she could protect him. On the whole evidence counsel for the defendant submitted that the presumption of a gift had not been rebutted. The learned judge's findings of fact upon the whole evidence were that the plaintiff had paid all the moneys that had been expended (this had not been denied), and that his wife's name was used as a shield against creditors, and that the wife knew the purpose for which her name was inserted in the lease.

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On these findings he made a declaration that she was trustee of the property of her husband. The question argued in the county court at the conclusion of the case apparently was whether there was any evidence to rebut the presumption of a gift, and to establish the claim to a declaration. It was contended before us that there was no evidence, but also that, if the learned judge was wrong in not nonsuiting, the defendant was entitled to succeed whatever might be the result of the evidence that was afterwards called. In our opinion the learned judge was bound, and we are bound, to have regard to the whole of the facts when once the evidence was called. It is not material now, because, in our opinion, the learned judge's view was erroneous both in refusing to nonsuit and in his ultimate judgment. His findings of fact must be taken to mean that the plaintiff, with his wife's knowledge and connivance, concocted the scheme of putting his property in her name, while retaining the beneficial interest, for the purpose of misleading, defeating, and delaying present or future creditors. This was the whole basis of the plaintiff's case, and it could not be put in any other way consistently with his claim to be owner of the property. It was the reason he himself gave for his conduct. Now, assuming that there was evidence to support the finding that the defendant was a party to the scheme which the plaintiff admitted, but without deciding it, what the learned judge has done is this: He has permitted the plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this; and, whether the point was taken or not in the county court this Court cannot allow a judgment to stand which has given relief under such circumstances as that. If authority is required for the proposition that relief cannot be granted in such a case as this, there is ample authority to support it. In *Cottington* v. *Fletcher* (1) a similar claim to this was made by a plaintiff in respect of an advowson which he had owned when he was a Papist. It was liable to forfeiture under certain statutes, and, in order to conceal the truth and protect his property, he assigned it to one of two defendants under an arrangement that the defendant should hold it as trustee. Subsequently he became a Protestant, and he claimed a reassignment. This being

(1) (1740) 2 Atk. 156.

refused, he commenced proceedings in the Court of Equity claiming a declaration that the defendant was a trustee. The defendant by plea pleaded the Statute of Frauds, but he filed an answer admitting the trust, but claimed the right under his trust to present his co-defendant. Lord Hardwicke held that, the trust being admitted in the answer, the Court must give effect to it, but intimated that if the defendant had demurred he would have succeeded. He doubted, he said, inasmuch as the assignment was in fraud of the law, whether the plaintiff could be relieved, "such fraudulent conveyances being made absolute against the grantor." It will be observed that in that case there was no presumption of a gift such as there was here, so it was a stronger case than this. A similar question arose before Lord Eldon in *Muckleston* v. *Brown*. (1) Lord Eldon commented on the decision in *Cottington* v. *Fletcher* (2), and said that if the defendant there had demurred the relief would have been refused, because the plaintiff stated that he had been guilty of a fraud upon the law, to evade and disappoint the provision of the Legislature, "and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the Court would not act; but would say, Let the estate lie where it falls." The same view was expressed or indicated in *Davies* v. *Otty* (3), although the fraud was negatived in fact. The appeal must be allowed and the declaration discharged, and judgment entered for the defendant with costs here and below.

Appeal allowed. Leave to appeal.

Solicitors for appellant: *Jenkinson, Meyler & Oliver.*
Solicitor for respondent: *H. C. Burrell.*

(1) (1801) 6 Ves. 52, 68. (2) 2 Atk. 156.
(3) (1866) 35 Beav. 208.

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[IN THE COURT OF APPEAL.]

KEMP *v.* ELISHA.

[1917 K. 15.]

Hackney Carriage—Negligence of Driver—Liability of Person registered as Proprietor—Managing Director of Company—Conclusiveness as to registered Proprietor being the Owner—London Hackney Carriage Act, 1831 (1 *&* 2 *Will.* 4, *c.* 22)*—London Hackney Carriages Act,* 1843 (6 *&* 7 *Vict. c.* 86)*—Metropolitan Public Carriage Act,* 1869 (32 *&* 33 *Vict. c.* 115), *ss.* 6, 11*—Hackney Carriage Order of December* 30, 1907, *r.* 9.

By r. 9 of the Order of December 30, 1907, made by the Home Secretary under s. 6 of the Metropolitan Public Carriage Act, 1869, an application for a licence for a cab on behalf of any company shall be made by, and the licence shall be issued to, the secretary or manager of the company, and the person to whom a licence shall be so issued shall be responsible for the observance of the conditions under which the licence is granted.

A licence for a taxicab was applied for and issued to the defendant as the managing director of a limited company, and his name and address were entered in the register of licences of hackney carriages, kept at Scotland Yard, under the headings "Name of Proprietor" and "Address," with the addition of the words "Managing Director," and the name and address of the company. The plaintiff, a member of the public, was injured by, as he alleged, the negligent driving of the cab, and he brought an action against the defendant to recover damages. At the trial the plaintiff put in a certified copy of the entry in the register for the purpose of proving that the defendant, being registered as the proprietor of the cab, was liable for the acts of the driver. The defendant tendered evidence to show that he was not the owner or part-owner of the cab, and was therefore not liable. The judge rejected the evidence upon the ground that the entry in the register was conclusive as to the liability of the defendant as proprietor for the acts of the driver:—

Held, that the register was not conclusive, and that the evidence was wrongly rejected.

The definition of "proprietor" in s. 2 of the London Hackney Carriages Act, 1843, discussed.

APPLICATION for judgment or a new trial in an action tried before Salter J. and a jury.

The action was brought to recover damages for personal injuries occasioned to the plaintiff, one of the public, by the negligent driving of a taxicab. At the trial the plaintiff put in evidence a

certified copy of the entry in respect of the cab in the register of licences of hackney carriages, kept at Scotland Yard, for the purpose of proving that the defendant was registered as the proprietor of the cab and was therefore liable for the act of the driver. The register contained two columns headed "Name of Proprietor" and "Address," which were filled in as follows:—"Elisha, Frederick Cornelius, 98 Barnsbury Road, N., Managing Director; The Holland Park Taxi Supply Co., Ltd., 68A De Beauvoir Road, Hackney." The defendant tendered evidence to prove that he was not the owner or part-owner of the cab and that the driver was not his servant; and that under the provisions of r. 9 of the Metropolitan Hackney Carriage Order, dated December 30, 1907, and made by the Home Secretary under s. 6 of the Metropolitan Public Carriage Act, 1869 (1), application was made on behalf of the Holland Park Taxi Supply Company, Limited (2), by the defendant, the managing director of the company, and the licence was issued to him. The learned judge rejected the evidence upon the ground that the defendant was on the register as the proprietor of the cab and was liable as such to the public for the acts of the driver. The jury found for the plaintiff for 175*l.* damages, and judgment was entered for the plaintiff.

The defendant appealed.

J. B. Matthews, K.C., and *Harold Brandon*, for the defendant. Under the London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), the Commissioners of Stamps were the persons empowered to grant

(1) The Order is set out in the Statutory Rules and Orders, 1907, p. 714, and r. 9 is as follows:—"An application for a licence on behalf of any co-partnership or company shall be made by, and such licence shall be issued to, the senior partner, or to the secretary or manager of the company, as the case may be; and the person to whom a licence shall be so issued shall be responsible for the observance of the conditions under which the licence is granted, and shall be liable to all penalties for breaches of such conditions as if he were the person solely interested in the licence."

(2) It was stated that the company consisted of cab-owning drivers, the company buying the cabs and letting each cab out to a driver who paid weekly contributions in respect thereof and who after paying a certain number of contributions became the owner of the cab.

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licences for hackney carriages. This was followed by the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86). By s. 6 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), a Secretary of State is made the authority to license hackney carriages, and by s. 11 he may delegate this power to the Commissioner of Police; and by r. 1 of the Order of 1907 the Secretary of State authorized the Commissioner of Police to grant licences. It was held in *Morley* v. *Dunscombe* (1) and *Powles* v. *Hider* (2), that the relationship of master and servant existed between the registered proprietor of a hackney cab and the driver so far as the public were concerned; and those cases have been followed in *Venables* v. *Smith* (3), *King* v. *London Improved Cab Co.* (4), and *Keen* v. *Henry* (5), where *King* v. *Spurr* (6) was stated to have been overruled by *King* v. *London Improved Cab Co.* (4) In *Gates* v. *Bill & Son* (7) it was held that the liability imposed by the Acts on cab proprietors was not confined to the registered proprietor, but extended to all proprietors. In all those cases, however, the person sued was the actual proprietor of the cab. The defendant was bound by r. 9 of the Home Secretary's Order of 1907 to apply for the licence and to get registered as he did on behalf of the company, but there is nothing in the Acts (8) or in any decision on the Acts to show that the defendant, though registered as the proprietor, cannot adduce evidence to prove that he is not the proprietor. A regulation made by the Home Secretary cannot make him liable as proprietor. The registration therefore is not conclusive as to the ownership of the cab, and the evidence was admissible. There ought to be a new trial. [*Fowler* v. *Lock* (9) and *Playle* v. *Kew* (10) were also referred to.]

Next, on the true construction of the entry in the register the company are registered as the owners of the cab, and not the defendant.

(1) (1848) 11 L. T. (O.S.) 199.
(2) (1856) 6 E. & B. 207.
(3) (1877) 2 Q. B. D. 279.
(4) (1889) 23 Q. B. D. 281.
(5) [1894] 1 Q. B. 292.
(6) (1881) 8 Q. B. D. 104.
(7) [1902] 2 K. B. 38.
(8) The provisions of the Acts (1 & 2 Will. 4, c. 22, 6 & 7 Vict. c. 86, and 32 & 33 Vict. c. 115), some of which have been repealed, are fully dealt with in the judgments.
(9) (1872) L. R. 7 C. P. 272; (1874) L. R. 9 C. P. 751, n.; L. R. 10 C. P. 90.
(10) (1886) 2 Times L. R. 849.

Schiller, *K.C.*, and *David White*, for the plaintiff. The object of the London Hackney Carriage Acts is to have some one's name on the register of licences to whom the public can look as the person responsible as proprietor for the acts of the driver. Sect. 2 of the London Hackney Carriages Act, 1843, defines the word "proprietor" as including "every person who, either alone or in partnership with any other person, shall keep any hackney carriage or any metropolitan stage carriage, or who shall be concerned otherwise than as a driver or attendant in employing for hire any" such carriage. That exactly covers the case of the defendant. Moreover, the Acts do not consider who is the true owner; they are concerned with the registered owner. If a person is on the register as the managing director of a company, he is the proprietor within the meaning of the Acts. There is nothing, however, to prevent the real owner being liable though not registered: *Gates* v. *Bill & Son.* (1) Rule 9 of the Order of 1907 is not ultra vires. Sect. 6 of the Metropolitan Public Carriage Act, 1869, gives the Secretary of State power to grant licences on such conditions as he may by Order prescribe. The decisions in *Powles* v. *Hider* (2), *Venables* v. *Smith* (3), *King* v. *London Improved Cab Co.* (4), and *Keen* v. *Henry* (5) proceed upon the footing that the person who is registered as the proprietor of the cab is liable to the public as the real owner for the acts of the driver. The learned judge therefore rightly rejected the evidence.

The COURT intimated that if they wished to hear a reply they would let the defendant's counsel know.

Cur. adv. vult.

Nov. 30. PICKFORD L.J. read the following judgment:—This action was brought by the plaintiff to recover damages for personal injuries occasioned to him by reason of the negligent driving of a taxicab. The case was tried before Salter J. and a jury, and a verdict was found for the plaintiff for 175*l.* During the course of the trial the defendant's counsel tendered evidence to prove that, although the name of the defendant appeared upon the public register of licences of hackney carriages under the heading

(1) [1902] 2 K. B. 38.
(2) 6 E. & B. 207.
(3) 2 Q. B. D. 279.
(4) 23 Q. B. D. 281.
(5) [1894] 1 Q. B. 292.

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"proprietor," he was neither the owner nor part-owner of the cab, and that his name was only placed on the register as managing director of a limited company by reason of r. 9 of the Order of the Home Secretary made on December 30, 1907, under s. 6 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115). The learned judge rejected the evidence on the ground that such proof was immaterial, and that, as the defendant's name appeared on the register as proprietor, he was responsible for all the acts of the driver of the cab, although he might have no interest whatever in it. Judgment was therefore entered for the plaintiff for the amount found by the jury.

The question arising on this appeal is whether the evidence was properly rejected. In order to decide this point it must be assumed that the evidence established the facts in support of which it was tendered, and the question may be thus stated: Is a person who has no interest as owner or part-owner in a registered hackney carriage liable in damages for all the acts of the driver by reason merely of the fact that his name appears on the register as proprietor? I think it is well to consider the matter first apart from authority. The licence in this case, in respect of which the entry on the register was made, was granted to the defendant under the powers contained in s. 6 of the Metropolitan Public Carriage Act, 1869, before mentioned, but in considering the matter it is necessary to notice two earlier Acts, the London Hackney Carriage Act, 1831 (1 & 2 Will. 4, c. 22), and the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86).

The defendant was the managing director of a limited company formed for the purpose of acquiring taxicabs upon terms not material to this case. It must be assumed that the defendant as such managing director had no property or direct personal interest in any cab acquired by the company. In these circumstances no relation of master and servant, and indeed no relation at all, was created at common law between the defendant as managing director and any individual driver. If, therefore, the fact of registration creates such a relation it must be by reason of some statutory provision to that effect.

In order to ascertain if there be any such statutory provision it is necessary to look at the enactments dealing with licensing and

registration as concerned with hackney carriages. The first provisions as to licences and registration which it is necessary to consider are those of 1 & 2 Will. 4, c. 22, contained in ss. 7, 11, 12, 20, and 32. The effect of these provisions is broadly that upon the application of one or more of the proprietors of a hackney carriage a licence containing the name and address of every such proprietor or part-proprietor might be granted, and that the particulars of such licence should be entered in a book kept for that purpose. It was also provided that a plate bearing the name of one of the proprietors should be affixed in a conspicuous place on the hackney carriage.

The next Act I think it necessary to consider is the London Hackney Carriages Act, 1843, which contained provisions in s. 8 for the licensing of drivers, and by s. 3 applied such of the provisions of the Act of 1831 as were not repealed to hackney carriages within the meaning of the Act of 1843. The effect of this was to leave the regulation of licences granted to proprietors under the Act of 1831. The Act of 1843, however, contained provisions in ss. 23, 24, 27, 28, and 35 which imposed a liability upon proprietors for some of the acts of the drivers, and in one case a liability to pay compensation to a limited extent to persons injured by such acts. It also contained a definition of proprietor to this effect: "The word 'proprietor' shall include every person who, either alone or in partnership with any other person, shall keep any hackney carriage or any metropolitan stage carriage, or who shall be concerned otherwise than as a driver or attendant in employing for hire any hackney carriage or any metropolitan stage carriage." This definition seems to extend the meaning of the word "proprietor" for the purpose of the Act beyond that of owner or part-owner, and to subject persons coming within that definition to the provisions of the Act as to proprietors. This, however, is quite irrespective of the question of registration; the provisions apply to the proprietor whether registered or not. If, as was contended, this definition includes the managing director of a cab-owning company, it equally includes the manager of a private cab-owning firm who is not, and cannot under present legislation and regulations be, upon the register.

This state of things continued as to licensing and registration of proprietors the same for all purposes material to this case down to the

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year 1869, when two statutes were passed which made great alterations. By s. 39 of the Revenue Act, 1869 (32 & 33 Vict. c. 14), the provisions of the Act of 1831 as to licensing and registration were repealed, and by the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), other provisions as to the grant of hackney carriage licences came into existence. Sect. 3 of the London Hackney Carriages Act of 1843 was not repealed, but it seems to me that, in spite of the provisions of that section, the repealed sections of the Act of 1831 ceased to be operative. It is not, however, necessary to decide this point, for, in my opinion, if they continue operative the result is the same so far as this case is concerned.

By s. 6 of the Act of 1869 (c. 115) it is provided that one of Her Majesty's Principal Secretaries of State may from time to time license to ply for hire within the limits of that Act hackney and stage carriages under certain conditions. The section is as follows: "One of Her Majesty's Principal Secretaries of State may from time to time license to ply for hire within the limits of this Act hackney and stage carriages, to be distinguished in such manner as he may by Order prescribe. Any licence in respect of a hackney or stage carriage under this section may be granted at such price, on such conditions, be in such form, be subject to revision or suspension in such events, and generally be dealt with in such manner as the said Secretary of State may by Order prescribe . . . ."

Under s. 11 the Secretary of State has delegated the duty of granting such licences to the Commissioner of the Metropolitan Police. This Act does not anywhere use the word "proprietor," but imposes certain penalties upon the owner of a hackney carriage (see s. 8).

Under the powers of this Act Orders have been made in 1871, 1897, 1907, and 1917 by the Home Secretary regulating the grant of licences, and that in force at the time of this case was made in 1907. The earlier Orders on this point were to the same effect. Rules 2, 8, and 9 of the Order of 1907 are in these words:—

Rule 2: "A person desirous of obtaining a licence for a cab or a stage carriage, shall make application at the office of the Commissioner. Such application, if for a cab licence, shall be in the form contained in Schedule A hereto; or, if for a stage carriage licence, shall be in the form contained in Schedule B hereto."

Rule 8: "A licence for a cab shall be in the form contained in

Schedule D hereto; and for a stage carriage shall be in the form contained in Schedule E hereto."

Rule 9: "An application for a licence on behalf of any co-partnership or company shall be made by, and such licence shall be issued to, the senior partner, or to the secretary or manager of the company, as the case may be; and the person to whom a licence shall be so issued shall be responsible for the observance of the conditions under which the licence is granted, and shall be liable to all penalties for breaches of such conditions as if he were the person solely interested in the licence."

The forms referred to are as follows: [The Lord Justice read the forms, which are set out in the Statutory Rules and Orders, 1907, pp. 724, 725.] So far as I know these Orders contained the first provisions for issuing a licence to any one not the owner or part-owner of a hackney carriage, and before the Act of 1869 no licence was issued to such a person. It is to be noticed that the Order and forms recognize that the application for a licence is made, not on behalf of the person making it, but on behalf of the company of which he is a nominee, and he is described on the register as managing director of a limited company. The words of the register are: [The Lord Justice read them.] The Order imposes upon the person to whom a licence shall be issued the responsibility for the observance of the conditions under which it is granted and a liability for all penalties for breaches of such conditions. The conditions are set out in the Order. It is not necessary to consider whether the Secretary of State had power by this Order to subject the holder of the licence to penalties, but I notice that this part of the rule has been omitted in the latest Order made in 1917. Giving the rule its full effect, it only subjects the holder of the licence to certain obligations, and nowhere provides that because he appears upon the register as proprietor he is to be considered for all purposes a proprietor in the ordinary sense, i.e., an owner or part-owner. In the same way, assuming the defendant to be within the definition of a proprietor in the Act of 1843, he is subjected by that Act to certain liabilities for the acts of the driver, but is nowhere subjected to all the liabilities of an owner.

This liability imposed on him by the Act is, as I have already pointed out, independent of the fact of registration. The provisions

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as to registration so far as they concern proprietors are not very clear, and I do not think it necessary to examine them closely. It is enough to say that, assuming that there must be registration of proprietors, there is nothing contained in those provisions which by the mere fact of registration puts the person registered in the position for all purposes of a proprietor of the cab. There is, therefore, as it seems to me, nothing in any of the Acts or regulations to create the relation of master and servant between the defendant and the driver and render him liable for the driver's acts merely because he is on the register under the name proprietor, and at common law no such relation and no such liability exist.

It was, however, contended that we are bound by authority to hold the registered proprietor responsible for the acts of the driver, and there are expressions in the cases cited to us which, taken by themselves without relation to the questions and considerations before the Court, are to this effect. The strongest is that of Lord Esher M.R. in *Keen* v. *Henry* (1): "If, therefore, the driver of a hackney carriage does that which amounts to a breach of contract with a person who hires the carriage—for instance, if he loses his luggage—the owner of the luggage can maintain an action for damages against the registered proprietor of the carriage, although the driver was not his servant." If these expressions had been used after consideration of the question now before us, or if I could see that it had ever been brought under the notice of the learned judges who used them, I might feel that I ought to decide in accordance with them although they were not necessary for the actual decision of the cases. But in my opinion it would be wrong and misleading to consider them apart from the circumstances of the cases in which they were used. After an examination of those cases I am satisfied that the question in this case was never under consideration in any of the cases cited, and that there was no occasion in any of them to distinguish between the position of a registered proprietor, who was an owner or part-owner, and a registered owner, who was put on the register as a nominee of another as in this case. In every case the person held liable was an owner or part-owner of the hackney carriage, and in one, *Gates* v. *Bill & Son* (2), the person so held liable was not on the register at all.

(1) [1894] 1 Q. B. 292, 294. (2) [1902] 2 K. B. 38.

The authorities cited to us are all founded upon the two cases of *Powles* v. *Hider* (1) and *Venables* v. *Smith*. (2) The question in these cases (apart from a question of estoppel in *Powles* v. *Hider* (1) with which I will deal later) is in my opinion this: Given an ownership or part-ownership in the hackney carriage which creates some relation between the owner or part-owner, who sends it out for hire, and the driver, is that relationship, so far as concerns the public, to be considered that of master and servant so as to make the owner or part-owner responsible for the driver's acts? The Courts held that owing to the effect of the provisions of the Act of 1843 that was the correct view. No mention is made of the Act of 1869 or of any Orders under it, and except under that Act and those Orders no person was on the register as a proprietor except an owner or part-owner. It is therefore not surprising that the expressions "proprietor" and "registered proprietor" are used indifferently by the learned judges, for there was no distinction between the two for the purpose of the cases before them. In *Powles* v. *Hider* (1) and in *Venables* v. *Smith* (2) I cannot find that the words "registered proprietor" were used at all, and this is also the case in *King* v. *London Improved Cab Co.* (3) The only reference to registration is in the judgment of Lindley L.J. (4) where he says: "I will only add that the regulations as to what has to be registered and accessible to the public seem to be based on the supposition that where a proprietor allows persons to drive his cabs in the public streets such persons so far as the public are concerned are to be deemed servants of the proprietor"; and in this passage it is obvious from the words "allows persons to drive his cabs" that the Lord Justice was considering the case of an owner of the cabs. *Keen* v. *Henry* (5), where the expression is used most frequently, was avowedly founded upon *King* v. *London Improved Cab Co.* (3), and the defendant was the owner of the cab and also the registered owner. There was therefore no reason to distinguish between the one and the other and I think the last words of Lord Esher's judgment (6)—"The proprietors of hackney carriages cannot by letting their carriages escape from their liability under the statute"—

(1) 6 E. & B. 207.
(2) 2 Q. B. D. 279.
(3) 23 Q. B. D. 281.
(4) 23 Q. B. D. 283.
(5) [1894] 1 Q. B. 292.
(6) [1894] 1 Q. B. 294.

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show that he had not under his consideration the case of a person on the register who had no interest in the cab. Lopes L.J. (1) quotes from his own judgment in *King* v. *London Improved Cab Co.* (2), where he used the word "proprietor," and then immediately afterwards uses the expression "registered proprietor" as conveying the same meaning. Kay L.J. uses the expression "registered proprietor" once, and afterwards uses the word "proprietor" throughout. In the last case, *Gates* v. *Bill & Son* (3), the two expressions are used indifferently, and the last words of the judgment of Mathew L.J. (4)—"Lord Esher M.R. in the first of those cases (5) says that by virtue of the Act the relationship of master and servant must be deemed to exist; and the judgments of himself and his colleagues in that case and in *Keen* v. *Henry* (6) shew that, when a cab proprietor lets his cab upon the terms on which the cab was let in this case, the relation of a master to a servant must now be treated as imposed by law upon the cab proprietor with regard to the driver"—show that the only case the Court was considering was one where the proprietor or registered proprietor was the owner or part-owner.

I think there is nothing in these cases, when properly examined, to suggest that the learned judges who decided them meant by the use of the words "registered proprietor" to intimate that registration created any liability which did not otherwise exist, or that the relation of master and servant existed between a person with no interest in the cab as owner or part-owner and the driver. We are therefore, in my opinion, free to consider the matter on principle.

In *Powles* v. *Hider* (7), where the law required the proprietor's name to be upon the cab, estoppel was suggested as the ground of the defendant's liability. In this case no such question can arise. The plaintiff, of course, never saw the register and never heard of the defendant till after the accident; and if he had seen the register the information it would have conveyed to him would have been that the defendant's name was there as the nominee of the limited company.

(1) [1894] 1 Q. B. 295.
(2) 23 Q. B. D 284.
(3) [1902] 2 K. B. 38.
(4) Ibid. 44.
(5) *King* v. *London Improved Cab Co.*, 23 Q. B. D. 281.
(6) [1894] 1 Q. B. 292.
(7) 6 E. & B. 207.

I think, therefore, that if the defendant prove that he had no interest in this taxicab he is not liable in this action; but of course I cannot tell whether he will prove it till the evidence has been heard. I think the evidence was wrongly rejected, and that there must be a new trial. The appellant must have the costs of the appeal in any event, and the costs of the first trial will abide the event of the new trial.

BANKES L.J. read the following judgment:—In this action the plaintiff sought to recover damages for personal injuries sustained owing to the negligent driving of a taxicab by a person alleged to be the defendant's servant. The action was tried before Salter J. The defendant tendered evidence to show that he was not the owner of the taxicab, and that the driver was not his servant. The learned judge, upon the authority of certain decided cases which were cited to him, considered himself bound to exclude the evidence upon the ground that the fact that the defendant was on the register of licences of hackney carriages as the proprietor of the taxicab in question was conclusive on the question of whether the driver of the taxicab was the defendant's servant or not. Counsel for both the parties to this appeal have dealt very fully with the statutes, and with the decided cases which it is necessary to consider, much more fully probably than was done before the learned judge, and a somewhat curious state of things is disclosed.

The first statute which it is material to consider is the Act 1 & 2 Will. 4, c. 22 (1831), which repealed the then existing Acts relating to hackney carriages. It provided by s. 7 for the issue of licences by the Commissioners of Stamps for the keeping, using, employing, or letting for hire of any hackney carriage. Sect. 11 required the proprietor or one of the proprietors of the hackney carriage in respect of which a licence was applied for to sign a requisition in the prescribed form in which the name of every person who was proprietor or part-proprietor of such hackney carriage, or concerned either solely or in partnership with any other person in the keeping, using, employing or letting to hire of such hackney carriage, was to be entered. Sect. 12 provided that the licence should contain the full name and address of every such person. Sect. 20 provided that a plate should be affixed in a conspicuous place on each side of the

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hackney carriage bearing in black letters on a white ground the Christian name and surname of the proprietor or one of the proprietors of the hackney carriage. Sect. 32 required that the particulars of every licence should be entered in a book kept for the purpose at the head Office for Stamps.

In *Powles* v. *Hider* (1), decided in the year 1856, the defendant sought to set up that the driver of a hackney carriage of which he was the registered proprietor was not his servant, but was a bailee of the cab from him. In giving judgment in favour of the plaintiff Lord Campbell C.J. (2), after referring to the provisions of the statute, says that "the proprietor who applies for and accepts a licence to which" the condition of placing a plate upon the hackney carriage with his name upon it "is annexed, and employs his cab under it, must be considered to hold himself out to the world as the proprietor; and he must incur the liabilities of proprietor to all who use the cab with the authority of the driver in the ordinary course of dealing." In this case, as in all the other cases to which we were referred, the person sought to be charged was in fact the owner or part-owner of the hackney carriage, and, so long as the statute of 1831 remained in force, the person who was registered as the proprietor of the hackney carriage was so registered, because he either was or represented himself to be the proprietor. All the sections of the Act of 1831 to which I have referred were repealed by s. 39 of the Revenue Act, 1869.

Meanwhile the two statutes of 1838 and 1843 (1 & 2 Vict. c. 79 and 6 & 7 Vict. c. 86) had been passed. Both of these statutes, so far as the question of licences is concerned, dealt, and dealt only, with the licences to be granted to the drivers and conductors of hackney carriages and to watermen, and did not deal with licences to be granted to proprietors of hackney carriages or the registration of such persons, both of which continued to be regulated by the Act of 1831. The statutes of 1838 and 1843, however, imposed considerable obligations upon the class of persons included in the definition of "proprietor" under those Acts, namely, "every person who, either alone or in partnership with any other person, shall keep any hackney carriage . . . . or who shall be concerned otherwise than as a driver or attendant in employing for hire any

(1) 6 E. & B. 207. (2) Ibid. 213.

hackney carriage . . . ." It will be noticed that this definition follows to some extent the language used in ss. 11 and 12 of the Act of 1831, though it includes a class of persons such as a managing director of a cab-owning company, who was certainly not within the contemplation of the Legislature when the Act of 1831 was passed. In the same year that the provisions of the Act of 1831 to which I have referred were repealed the Metropolitan Public Carriage Act, 1869, was substituted for them. This Act (32 & 33 Vict. c. 115) made a very considerable change in regard to licences in respect of hackney carriages. The authority to issue the licence is no longer the Commissioners of Stamps. One of His Majesty's Principal Secretaries of State becomes the authority to issue the licence. The licence itself is no longer described as a licence to an individual. It is treated as being a licence of the hackney carriage itself. The expression "proprietor" is not used in the later Act, and the provision with regard to the name-plate on the hackney carriage is not continued. There is no longer any express provision for the registration of the proprietors of hackney carriages. Sect. 6 of the Act of 1869 provides that any licence in respect of a hackney carriage may be granted on such conditions and in such form as the Secretary of State may prescribe. By an Order dated March 10, 1871, the Home Secretary prescribed certain conditions in relation to the granting of licences. These conditions, unlike the provisions of the Act of 1831, make no provision requiring the person who applies for the licence to be in any way interested either in the ownership or the working of the hackney carriage. Rule 11 deals with a case where a co-partnership or a company is making application for a licence, and in such a case it provides that the application shall be made by, and the licence issued to, the senior partner or manager of the company as the case may be, and that the person to whom such a licence is issued shall be responsible for the observance of the conditions under which the licence was granted, and shall be liable to all penalties for breaches of such conditions as if he were the person solely interested in the licence. A number of the rules refer to the "proprietor" of the hackney carriage, and impose certain duties and obligations upon him, but the expression "proprietor" is nowhere defined. Presumably, having regard to the provisions of s. 15 of the Act of 1869, the same meaning must be given to the

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expression as in the Act of 1843. By regulations made at the same time under s. 9 of the Act of 1869 the driver by reg. 28 is required to deliver to the hirer on entering the hackney carriage a ticket containing a list of fares on one side, and on the other the proprietor's name and address, and a footnote is appended, "Reference in case of complaints, or of property being left in the carriage, to be made either to the proprietor, at the above address, or to a police station." A new Order was made by the Secretary of State dated August 18, 1897, but it does not contain any alterations material to be noted. It is a curious fact that in the many cases decided under the Hackney Carriage Acts, and to which our attention has been called, in not a single instance was any reference made in the judgments to the Metropolitan Public Carriage Act, 1869, or to the Orders made under it. I can only assume that this was because the person who was sought to be made liable for the act of the driver of the hackney carriage was either the owner or the part-owner of the hackney carriage, and it was therefore immaterial to point out that since the repeal of the Act of 1831 the fact of being upon the register as the licensed proprietor of a hackney carriage not only no longer involves the conclusion that the person who had been so placed upon the register either was, or had represented himself to be, either owner or part-owner or concerned either solely or in partnership with some other person in the keeping, using, employing, or letting to hire of such hackney carriage, but that the provisions of the Orders with reference to the managers of companies made it impossible that with regard to those particular persons they could be the proprietors in the sense of being owners or part-owners of the hackney carriages in respect of which their names appeared on the register. The decisions to which reference was made in their order of date were as follows: *Venables* v. *Smith* (1877) (1); *King* v. *Spurr* (1881) (2); *King* v. *London Improved Cab Co.* (1889) (3); *Keen* v. *Henry* (1893) (4), and *Gates* v. *Bill & Son.* (5) The effect of these decisions is summarized by Buckley L.J. in *Doggett* v. *Waterloo Taxi-Cab Co.* (6), and by Lord Atkinson in *Smith* v. *General Motor Cab Co.* (7) Buckley L.J.

(1) 2 Q. B. D. 279.
(2) 8 Q. B. D. 104.
(3) 23 Q. B. D. 281.
(4) [1894] 1 Q. B. 292.
(5) [1902] 2 K. B. 38.
(6) [1910] 2 K. B. 336, 342.
(7) [1911] A. C. 188, 192.

treats these cases as being decisions as to the relation between "owner" and driver of a hackney carriage. Lord Atkinson puts the result of the cases in this way. He says: "It may well be that though the relation between the taxicab owner and his driver inter se be that of bailor and bailee, the driver may still quoad third parties be treated as the agent of the proprietor authorized to ply for hire in the streets for reward to the latter; and the proprietor be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority. The general result of the cases of *Fowler* v. *Lock* (1), *Venables* v. *Smith* (2), *King* v. *London Improved Cab Co.* (3), *Smith* v. *Bailey* (4), and *Gates* v. *Bill & Son* (5), cited in *Doggett's Case* (6), is that in the case of horse-drawn cabs, where drivers were given them in charge under terms resembling those admitted to exist in the present case, the relation between the proprietor and driver was that of bailor and bailee, but that quoad third parties the drivers were, under the provisions of the Metropolitan Hackney Carriage Act, 1843 (admittedly applicable to taxicabs), deemed to be the servants of the proprietors." In this passage the expressions "proprietor" and "owner" are used as having the same meaning. The cases to which Lord Atkinson refers are binding upon this Court, but in no case has the question which is raised by the present appeal been either raised or decided.

The question which we have to decide is whether a managing director of a company to whom a licence in respect of a hackney carriage has been issued under r. 9 of the Order of the Home Secretary made under the Act of 1869, and dated December 30, 1907, is estopped from alleging that he is not the proprietor of the hackney carriage in the sense of being an owner or part-owner of the carriage or an employer of the driver. In my opinion he is not. There is nothing either in the statutes or in the decided cases which compels us to so hold, and I can see no reason why he should not be entitled to prove what the real fact is. As I have already pointed out, the statute of 1869 imposes no condition as to ownership upon the person applying for a licence. The Order of the Home Secretary imposes no such condition. The Order, on the contrary, in the case of

(1) L. R. 7 C. P. 272.
(2) 2 Q. B. D. 279.
(3) 23 Q. B. D. 281.
(4) [1891] 2 Q. B. 403, 405.
(5) [1902] 2 K. B. 38.
(6) [1910] 2 K. B. 336, 342.

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companies makes it plain that the person to whom the licence is to be issued is not an owner or part-owner. The managing director of a cab company no doubt comes within the definition of proprietor contained in the Act of 1843 as a person "concerned otherwise than as a driver or attendant in employing for hire" the cabs of the company, and as such is liable for the penalties prescribed by the Act. The Order of the Home Secretary cannot, I think, be read as requiring the registration of a managing director in any other capacity than the one I have indicated. Under these circumstances I read the entry in the register literally—namely, that the defendant, who is there described as the managing director, is correctly entered under the heading of proprietor as defined by the Act of 1843, but the entry does not carry with it the same inference as the entry would have done had it been made under the Act of 1831, or estop the defendant from proving if he can that he has no property or interest in the taxicab and that the driver is under no agreement at all with him. I agree that the appeal must be allowed.

SARGANT J. read the following judgment:—The ruling of Salter J. here involves two propositions—namely, first, that the proprietor of a metropolitan hackney cab or taxicab is responsible for the acts of the driver on the footing of master and servant, and, secondly, that the registration of a person as proprietor is conclusive to establish his proprietorship for this purpose, and does not leave it open to him to dispute the fact that he is the actual proprietor. The question to be determined on this appeal is whether that ruling, and particularly the proposition secondly involved in it, is right.

I will assume for this purpose against the defendant that the provisions of the London Hackney Carriage Act, 1831, as to the registration of proprietors of hackney cabs were continued by s. 3 of the London Hackney Carriages Act, 1843; that there was introduced into these provisions the definition of proprietor in s. 2 of the latter Act; and even that, notwithstanding the repeal of the greater portion of the earlier Act by s. 39 of the Revenue Act, 1869, these provisions, as continued in the Act of 1843, were again continued or re-enacted by s. 15 of the Metropolitan Public Carriage Act, 1869. If the matter were res integra there might be doubt as to these assumptions, particularly as to the last assumption, and I

do not find that in any of the decided cases since 1869 the exact course of the legislation in question has been considered either in the reported arguments or in the decisions, though s. 39 of the Revenue Act, 1869, is referred to in the argument in *King* v. *London Improved Cab Co.* (1) But in all probability these points were considered by those who argued and decided the cases, and some or all of the assumptions were deliberately though tacitly made. And it is unnecessary to say more on this point, because there are, in my judgment, other sufficient reasons for deciding this appeal in the defendant's favour.

Now, on this footing there are undoubtedly cases, one or more of which are binding on this Court, such as *Powles* v. *Hider* (2), *Venables* v. *Smith* (3), and *King* v. *London Improved Cab Co.* (4), which establish the first branch of the ruling of Salter J., namely, that the proprietor of a hackney cab is liable to the public for the acts of the driver as if the relationship of master and servant existed between them, although the actual relationship may be different. But I can find nothing in the cases to warrant the second branch of the ruling, namely, that registration is conclusive in all cases to establish actual proprietorship, so as to saddle the person registered as proprietor with the liabilities of an actual proprietor. In all the cases cited the person held responsible was the actual proprietor or one of the actual proprietors, though he was not always a registered proprietor. And the fact that non-registration was not sufficient to enable a real proprietor to escape liability (*Gates* v. *Bill & Son* (5)) militates against the conclusiveness of the register, and suggests, though it does not establish, that registration would not make the registered proprietor liable if he were not the actual proprietor. The only indication of a possible estoppel in consequence of registration, or of the effect of registration, is to be found in the second ground given for the decision in *Powles* v. *Hider*. (2) But there the action was brought by a hirer of the cab and was based on contract, and, further, the hirer was deemed to have known and acted on the faith of a plate on the cab stating that the defendant was the proprietor. The case is quite different when, as here, the action is one

(1) 23 Q. B. D. 282.
(2) 6 E. & B. 207.
(3) 2 Q. B. D. 279.
(4) 23 Q. B. D. 281.
(5) [1902] 2 K. B. 38.

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in tort by a person who could not have relied on any plate or other outward sign, even if, which was not the case, there had been any such sign to rely on.

It may be true that the Acts aim in general at the registration of one or more of the real proprietors so that in the ordinary case of a single owner the person who is the real proprietor will also be the registered proprietor. And there are obvious reasons why this should in general be so. But this does not necessarily or naturally involve making the registered proprietor liable as the real proprietor whatever the real facts may be. And when regulations made under subsequent amending legislation provide, as here, that in the case of cabs belonging to companies the manager or secretary is to be registered as such, I think they amount to a deliberate abandonment in such cases of the attempt to identify the real proprietor with the registered proprietor, and cannot properly be construed as operating to cast additional general liability for the acts of drivers on persons who are and are described as servants or nominees of owning companies. To effect so startling a result, or indeed to make the register in general conclusive to negative the real facts, it would be necessary to find much clearer language than any present here. A statutory estoppel of the kind suggested is not to be implied lightly.

It has, however, been suggested that, even if the defendant is not liable by virtue merely of his registration, he is within the definition of proprietor in the Act of 1843 by reason of his being the managing director of the company, and so necessarily concerned in the employment of the cab. To this there are in my opinion two answers. In the first place I am by no means satisfied that the intention found in the Acts to create the relation of master and servant in all cases between the proprietor and the driver can be extended so as to create that relation also between the driver and any person who, although concerned in the employment of the cab, is so concerned merely as the agent for and on behalf of the real proprietor. And in the next place I do not think that it must be assumed that when the true facts in relation to the proprietorship of this cab come to be known it will necessarily appear that the defendant, or even perhaps the company itself, was a proprietor within the meaning of the Act of 1843. It is suggested, and it may turn out to be the fact, that the

real proprietor was an altogether different person, namely, one who was buying the cab by means of financial assistance from the company, and who was in a position to drive the cab himself or allow it to be driven by others without any interference by the company, except such as was necessary to protect their financial interest.

For these reasons I agree that the appeal should be allowed and a new trial granted.

New trial ordered.

Solicitors for plaintiff: *S. A. Clench & Co.*

Solicitors for defendant: *Watson, Sons & Room.*

W. F. B.

servation of PICKFORD, L.J., at 252, *approved.* JACOBS *v.* L.C.C. 50] 1 All E.R. 737.

[IN THE COURT OF APPEAL.]

CHEATER *v.* CATER.

Nuisance—Landlord and Tenant—Overhanging Yew Trees—Lessor's Duty to Lessee.

A landlord let a farm to a tenant, retaining in his own possession adjoining land on which was a shrubbery containing yew trees so near the farm that the branches of the yew trees overhung the boundary and were within reach of the tenant's cattle and horses. The tenant's mare ate of the branches and died. The yew trees overhung the land substantially to the same extent and in the same condition both at the commencement of the tenancy and at the date when the mare ate of the branches:—

Held—following the judgment of Mellish L.J. in *Erskine* v. *Adeane* (1873) L. R. 8 Ch. 756, 761, that a lessee takes the property as he finds it—that, as the tenant took the land with the branches of the yew trees at that time overhanging it so as to be within reach of horses, the landlord was not liable for the loss of the mare.

Decision of the Divisional Court [1917] 2 K. B. 516 affirmed.

APPEAL from the judgment of a Divisional Court (Lord Coleridge and Rowlatt JJ.) on appeal from the county court of Gloucestershire holden at Cirencester; reported [1917] 2 K. B. 516.

The plaintiff was tenant to the defendant of a farm held upon a yearly tenancy from September, 1914. One of the fields of the farm

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adjoined land in the occupation of the defendant, and separated from it by a fence. On the defendant's land, about 3 feet from the fence, was a shrubbery of box, laurel, and yew trees. On January 4, 1917, two of the yew trees overhung the fence to the extent of 3 feet. The plaintiff said that he did not know of the existence of the yew trees, or that they were dangerous for cattle. The plaintiff's mare, in foal, was in the field, ate of the yew branches, and died. The Court of Appeal assumed the fact to be that the yew trees overhung the land substantially to the same extent and in the same condition both at the date of the commencement of the tenancy and at the date when the mare ate of the branches. The county court judge, upon the authority of the judgment of Mellish L.J. in *Erskine* v. *Adeane* (1), gave judgment for the defendant. In the Divisional Court, the learned judges differing in opinion, the appeal was dismissed. The plaintiff appealed.

Vachell, K.C., and *A. F. Clements* (*H. W. Samuel* with them), for the plaintiff. If the parties had been adjoining owners holding under independent titles the defendant would have been liable: *Crowhurst* v. *Amersham Burial Board* (2); *Smith* v. *Giddy* (3); see also *Humphries* v. *Cousins* (4); *Firth* v. *Bowling Iron Co.* (5); *Wilson* v. *Newberry*. (6) A landowner can lop the overhanging branches of trees growing on his neighbour's land: *Lemmon* v. *Webb*. (7) The duty of a landlord towards his tenant is not less than that of one adjoining owner to another. They are in the position of adjoining owners, the tenant being in the position of a vendee for a limited period. The liability is founded on the principle laid down in *Rylands* v. *Fletcher* (8); and this is so whether the yew trees overhung the plaintiff's field at the date of the demise or not. The maxim "sic utere tuo ut alienum non laedas" applies. The yew trees were part of a shrubbery planted on the land by the defendant or his predecessor in title, and maintained there by the defendant. A duty arose on the part of the defendant as soon as he had let the

(1) L. R. 8 Ch. 756, 761.
(2) (1878) 4 Ex. D. 5.
(3) [1904] 2 K. B. 448.
(4) (1877) 2 C. P. D. 239.
(5) (1878) 3 C. P. D. 254.
(6) (1871) L. R. 7 Q. B. 31.
(7) [1894] 3 Ch. 1.
(8) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

land to the plaintiff to take care that nothing on his land was the cause of injury to the plaintiff. Clearly if the yew trees were safe at the date of the demise and afterwards became dangerous, the landlord would be liable. As to the dictum of Mellish L.J. in *Erskine* v. *Adeane* (1), "caveat lessee," the Court was dealing with the question of implied warranty, and that dictum was not necessary for the decision and should not be followed. [*Alston* v. *Grant* (2) and *Jones* v. *Llanrwst Urban Council* (3) were also referred to.]

J. B. Matthews, K.C., and *Rayner Goddard*, for the defendant. The judgment of Mellish L.J. in *Erskine* v. *Adeane* (1) was based upon two grounds, one being the principle of caveat lessee, and therefore the latter is not a dictum but is one of the grounds of his decision; and James L.J. expressed no dissent from it. The statement of the law by Mellish L.J. has been accepted as sound ever since, and from that time contracts of tenancy have been entered into on the basis of that decision. The case of adjoining owners is different from that of landlord and tenant. *Crowhurst* v. *Amersham Burial Board* (4) was a case of adjoining owners. If a tenant takes a lease of land with branches of trees overhanging it, he takes it subject to the natural growth of the branches. The obligation is on the tenant to examine the boundaries, and he cannot afterwards complain of the natural growth of the trees. "As the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses": *Paradine* v. *Jane*. (5) "The tenant ought to examine the house before he takes it": per Alderson B. in *Arden* v. *Pullen*. (6) The doctrine of *Rylands* v. *Fletcher* (7) applies to the non-natural user of land: *Wilson* v. *Waddell*. (8) This is not the case of a landlord after the demise planting dangerous trees next the boundary of the demised land. In *Ponting* v. *Noakes* (9) the horse was a trespasser. There is no contract or condition implied by law on the demise of land that it is reasonably fit for the purpose for which it is taken: *Sutton* v. *Temple* (10); *Hart* v. *Windsor*. (11) In the absence of any agreement on the subject a person who agrees to take

(1) L. R. 8 Ch. 756, 761.
(2) (1854) 3 E. & B. 128.
(3) [1911] 1 Ch. 393, 405.
(4) 4 Ex. D. 5.
(5) (1647) Aleyn, 26, 27.
(6) (1842) 10 M. & W. 321, 326.
(7) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(8) (1876) 2 App. Cas. 95, 99.
(9) [1894] 2 Q. B. 281.
(10) (1843) 12 M. & W. 52.
(11) (1844) 12 M. & W. 68.

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a house must take it as it stands: *Chappell* v. *Gregory*. (1) An occupier of land is under no duty towards his neighbour to cut thistles growing naturally on his land, so as to prevent them from seeding in his neighbour's land: *Giles* v. *Walker*. (2) All those cases support the judgment of Mellish L.J. in *Erskine* v. *Adeane*. (3) The decision in *Smith* v. *Giddy* (4) is wrong, and ought to be reconsidered. *Giles* v. *Walker* (2) was not cited there.

But if the above contention is too wide, at least a tenant cannot complain until he gives notice to the landlord of the overhanging branches.

Vachell, K.C., in reply. In *Giles* v. *Walker* (2) the thistles were not planted on the defendant's land, but were the natural growth of the soil, and so it was held that there was no duty on the defendant to cut them. In the present case the yew trees were planted on the defendant's land by himself or his predecessor and maintained there by the defendant. *Smith* v. *Giddy* (4) is in accordance with the previous authorities.

PICKFORD L.J. This is an action to recover damages for the loss of a mare through eating branches of yew trees which were growing on the defendant's land. The question is whether the plaintiff is entitled to recover. It is not necessary to discuss many of the arguments put forward. In the Divisional Court the learned judges differed in opinion, but, as it seems to me, the difference was on the view taken of the facts and not of the law. Lord Coleridge J., who thought that the plaintiff could recover, stated the facts to be (5) that "at the time of the demise the tree, although it overhung the demised premises, was harmless. It could not be reached by cattle or horses, but during the tenancy it grew and came within reach of horses;" and when dealing with *Erskine* v. *Adeane* (3) he said (6): "I do not think Mellish L.J. meant to say that the tenant when he took the lease was bound to guard himself against dangers other than those existing at the date of the lease; he was not bound to assume that the landlord would omit to do what was proper for him to do, that he would neglect to cut the yew tree and would

(1) (1864) 34 Beav. 250.
(2) (1890) 24 Q. B. D. 656.
(3) L. R. 8 Ch. 761.
(4) [1904] 2 K. B. 448.
(5) [1917] 2 K. B. 518.
(6) Ibid. 520.

suffer it to become a danger." Therefore the foundation of his judgment is that at the time of the demise the tree could not be reached by horses, and that the liability of the defendant arose because he allowed that harmless condition of things to become harmful. Rowlatt J., who took another view of the facts, held that the case was governed by the judgment of Mellish L.J. in *Erskine* v. *Adeane* (1), but he went on to say (2): "I am not clear how the case would stand if the landlord had on his own land a yew tree which at the time of the demise did not overhang the boundary but afterwards during the tenancy grew over the boundary. Mellish L.J. seems to have contemplated such a case when he spoke of 'negligence in allowing the branches of the yew trees to grow over the hurdles' (3), and said that a claim would, if maintainable at all, be by personal action. But that case is much stronger than the present. In this case the land was taken with the tree already overhanging it, though no doubt it has grown since." It seems to me that if Rowlatt J. had taken the same view of the facts as Lord Coleridge J. probably he would have come to the same conclusion as that learned judge; and if Lord Coleridge J. had taken the same view of the facts as Rowlatt J. he would have held the case governed by the judgment of Mellish L.J. Accordingly it becomes necessary to consider the facts as shown by the evidence.

The case was argued for the plaintiff on the broad ground that, even though the yew trees overhung the plaintiff's land at the date of the demise, or even, as I understood the argument, overhung it so as to be then accessible to horses on the demised land, the defendant was liable upon the ground that it was his duty to see that the trees existing at the date of the demise were not harmful to the tenant of the demised land. In my opinion that proposition is not well founded. It is not necessary to go through the authorities. *Erskine* v. *Adeane* (1) is sufficient authority against that broad proposition. The first sentence in the head-note does not perhaps represent the facts quite accurately. It states: "There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises." That would seem to indicate that the trees were growing

(1) L. R. 8 Ch. 756, 761. (2) [1917] 2 K. B. 521.
(3) L. R. 8 Ch. 760, 761.

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on the demised premises. The facts were that the tenant took a lease of a farm which contained a plantation. The landlord reserved the plantation, which was therefore not demised to the tenant. Yew trees were growing in the plantation, and the branches extended over the land demised so as to be within reach of the cattle on that land. The trees therefore which occasioned the damage were not growing on the land demised. The suit in which the claim was made was for the administration of the estate of the deceased landlord. The Court held that the claim was not maintainable against the deceased's estate. James L.J. said that the claim did not rest on warranty, but upon a wrongful act, that is, negligence, of the landlord, and that no such claim could be made at common law against the estate of a deceased person, the cause of action having died with him. That does not throw any light on the present case. Mellish L.J. said (1): "Now it is clear that this claim, so far as it goes to negligence in keeping up the fences, or negligence in allowing the cuttings from the yew trees to be placed where the cattle could get at them, or the negligence in allowing the branches of the yew trees to grow over the hurdles, would all, if they (2) were maintainable at all, be by personal action." So far he is affirming the view of James L.J. But he goes on: "I may say, however, that, in my opinion, as far as regards the yew trees growing over the hurdles, no such claim could be sustained at all. With respect to what the Master of the Rolls seems to have rested his judgment upon, namely, that there was a warranty that no noxious trees should grow on the demised premises, I have never heard of any such warranty. The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees." That is a distinct statement of the law and not a dictum. It is the second ground given by the Lord Justice for his judgment. If a judge states two grounds for his judgment and bases his decision upon both, neither of those grounds is a dictum. The law so stated by

(1) L. R. 8 Ch. 760, 761. (2) *Sic.*

Mellish L.J. is in agreement with a series of cases of which *Sutton* v. *Temple* (1) is an early instance. In a case of this kind the tenant takes the land demised as it is, and therefore if the tenant here took the land with the yew trees growing over it so that his cattle could eat of the branches and they did eat, he cannot complain. Therefore the broad proposition argued on behalf of the plaintiff cannot be maintained.

Next, has the plaintiff established his second proposition, namely, that the condition of things has so changed during the tenancy that what was a condition of safety at the date of the demise has become a condition of danger? I can see no evidence of this. At the time when the mare ate of the yew tree its branches overhung the plaintiff's field so as to be within her reach. To what extent it overhung the field is left in doubt. If the plaintiff says that the condition of things was safe at the date of the demise, but became unsafe afterwards, it is for him to prove it. If he does not make it out he does not establish his cause of action. If there had been any miscarriage at the trial I should say that the case should be sent back to the county court. But it seems to me that the plaintiff rested his case in the county court, as here, upon this, that, whether the trees were safe at the date of the demise or not, they were a source of danger when the mare ate of them and died, and that therefore the defendant was liable. If the question of the trees being safe at the date of the demise was dealt with at all in the county court, it was decided against the plaintiff. The county court judge said that he was bound by the decision of Mellish L.J. in *Erskine* v. *Adeane* (2), and if so he must have come to the conclusion that the trees were overhanging the plaintiff's field at the date of the demise so as to be a source of danger. I do not say what the rights of the parties might have been if the plaintiff had proved that the trees were safe at the date of the demise. There was, however, no evidence of any material change of circumstances between the date of the demise and the date when the mare ate of the yew tree and died. It was the simple case of a demise to the plaintiff of land over a portion of which yew trees, growing on the defendant's land, extended so as to be within reach of horses,

(1) 12 M. & W. 52. (2) L. R. 8 Ch. 756.

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and the plaintiff's mare ate of the branches and died. That is not sufficient to establish liability in the defendant. The appeal must be dismissed.

BANKES L.J. I agree. The point argued before us is an important and interesting one, and may be shortly stated thus: What is the duty of a landlord on whose land trees grow and overhang the adjoining land which he has demised and cause damage? It is not necessary to decide some of the questions raised before us. It seems to me upon the authorities that a clear distinction must be drawn between disputes between adjoining owners and disputes between landlord and tenant. Between adjoining owners the law is clear. *Lemmon* v. *Webb* (1), *Crowhurst* v. *Amersham Burial Board* (2), and *Smith* v. *Giddy* (3) are cases of adjoining owners, and they establish that no real distinction can be drawn between damage caused by trees innocuous in themselves and damage caused by yew trees which may be poisonous. In *Lemmon* v. *Webb* (1) the complaint was occasioned by the overhanging branches of oaks and elms. Kekewich J., in giving judgment, said (4): "It is too late for counsel or judge to say that a neighbour's tree overhanging my land is not a nuisance. It is a nuisance of omission—that is to say, it is negligence on the part of the owner of the tree to allow the branches to overhang the land." Kay L.J. said (5): "The result of the authorities seems to be this: The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance. For any damage occasioned by this an action on the case would lie." That is exactly followed in *Smith* v. *Giddy* (3), the authority of which was challenged by the learned counsel for the defendant. The only substantial difference between those three cases is that in *Crowhurst* v. *Amersham Burial Board* (2) the tree was a yew, a poisonous tree. In that case Kelly C.B., in delivering the judgment of the Court, rested the decision not so much on nuisance as on the principle of *Rylands* v. *Fletcher*. (6) There is, however, not much, if any, difference in the result. In either

(1) [1894] 3 Ch. 1.
(2) 4 Ex. D. 5.
(3) [1904] 2 K. B. 448.
(4) [1894] 3 Ch. 5.
(5) Ibid. 24.
(6) L. R. 3 H. L. 330.

case liability for damage from overhanging branches is clearly established.

I pass to the case of landlord and tenant, where the considerations are entirely different. I accept fully the statement of Mellish L.J. in *Erskine* v. *Adeane* (1), which is in accordance with a long line of cases. He said: "The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is caveat emptor, so in the case of taking the lease of property the rule is caveat lessee; he must take the property as he finds it." In the present case the plaintiff was unable to prove that there was any essential difference between the condition of the yew trees at the date of the demise and at the date when the mare ate of the branches. No attempt was made to show that there was any such difference. Upon that ground the plaintiff fails. It is therefore not necessary to consider the interesting question whether, if that had been proved, namely, that a condition of safety existed at the date of the demise and a condition of danger arose afterwards, the defendant would be liable. If that had been the case the question would have to be decided, first, whether the rule stated by Mellish L.J. in *Erskine* v. *Adeane* (1) covers the natural growth of a yew tree from a condition of safety to a condition of danger; and, secondly, if it does not, what would be sufficient to constitute a breach of duty on the part of the landlord towards his tenant—whether the tenant ought to bring the state of things to the notice of the landlord before he could be considered guilty of negligence. Both these matters may have to be decided some day; they do not arise here, and I only mention them to show that we give no decision upon them. The appeal therefore falls.

SARGANT J. I am of the same opinion. I am not sure that the difference of view between Lord Coleridge J. and Rowlatt J. as to the facts is quite as great as Pickford L.J. suggests. Lord Coleridge J. said (2): "At the time of the demise the tree, although it overhung the demised property, was harmless. It could not be reached by cattle or horses, but during the tenancy it grew and came within

(1) L. R. 8 Ch. 761. (2) [1917] 2 K. B. 518.

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reach of horses." Rowlatt J. said (1): "In this case the land was taken with the tree already overhanging it, though no doubt it has grown since." I think that Rowlatt J. was drawing the distinction between the case of a yew tree overhanging the land at the date of the demise and its branches afterwards growing down so as to come within reach of the cattle on the demised land and the case of a yew tree not overhanging the land at all at the date of the demise, but which afterwards during the tenancy grew over the boundary. If the learned judge meant to say that there would be a distinction between those two states of things for the purpose of legal liability I do not know that I should agree with him. For the purpose of legal liability they seem to me to be identical. It is not, however, necessary to consider that. We have not to deal with the question which would arise if the yew trees were innocuous at the date of the demise but afterwards became noxious and in consequence the plaintiff's mare died from eating them. The effect of the evidence is to show that there was no substantial difference between the state of the trees at the date of the demise and their state at the date when the mare died. The case is therefore the simple one of a landlord letting land to a tenant with a yew tree on the adjoining land in the occupation of the landlord overhanging the land demised to such an extent as to be dangerous to the tenant's horses. To that state of things the reasoning of Mellish L.J. in *Erskine* v. *Adeane* (2) is applicable. The tenant could have seen that the yew trees overhung the demised land in such a way as to be accessible to cattle, and having taken the land in that state he cannot afterwards complain of damage arising from his mare having eaten of the branches.

If the damage had arisen from the subsequent growth of the yew trees, I reserve my decision upon that state of facts, but I am not, as I have said, prepared to assent to what I understand to be the view of Rowlatt J. that in that case there could be no liability. If trees on the adjoining property of the landlord subsequently grow so as to become dangerous to the tenant's cattle on his own land, it may be that the rights and obligations arising therefrom would be regulated by those between adjoining landowners rather than by those between landlord and tenant. I notice in the second part of

(1) [1917] 2 K. B. 521. (2) L. R. 8 Ch. 761.

Erskine v. *Adeane* (1) some observations of James L.J. at the end of his judgment which bear upon this. C. A. 1917 CHEATER v. CATER.

Appeal dismissed.

Solicitors for plaintiff: *Helder, Roberts, Giles & Walton, for F. Treasure, Gloucester.*

Solicitors for defendant: *Peacock & Goddard, for Sewell & Rawlins, Cirencester.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A. 1917 *Dec.* 12.

BROOKE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super-tax—Non-resident—Property in the United Kingdom—Chargeability—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

By s. 66, sub-s. 1, of the Finance (1909-10) Act, 1910, there shall be charged, levied, and paid "in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax," referred to in the Act as a super-tax; and by sub-s. 2, for the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. By s. 72, sub-s. 6, all provisions of the Income Tax Acts relating to the persons chargeable and the collection and recovery of duty shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of the super-tax:—

Held, that any individual, although not resident in the United Kingdom, whose total income entirely derived from property in the United Kingdom, when estimated in the prescribed manner, exceeds 5000*l.*, is chargeable with the super-tax in respect of that income.

Decision of Atkin J. [1917] 1 K. B. 61 on this point affirmed.

Held, also, that in calculating the income for super-tax purposes it was immaterial to consider whether or not income tax had been deducted from it at its source.

Quaere whether the reasoning in *Purdie* v. *Rex* [1914] 3 K. B. 112 is consistent with the decision of the House of Lords in *Ashton Gas Co.* v. *Attorney-General* [1906] A. C. 10.

APPEAL from a decision of Atkin J. (reported [1917] 1 K. B. 61) on a case stated by the Commissioners for the Special Purposes of

(1) L. R. 8 Ch. 762.

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BROOKE v. INLAND REVENUE COMMISSIONERS.

the Income Tax Acts under the Finance (1909-10) Act, 1910, and the Taxes Management Act, 1880.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on September 29, 1915, Marion Brooke, the appellant, appealed against an assessment to the super-tax in the sum of 11,000*l.*, less 3000*l.* statutory allowance, that is to say, 8000*l.* net, for the year ended April 5, 1912, made upon her by the description of Mrs. Marion Brooke (formerly Mrs. Marion Price under the provisions of (inter alia) s. 66 and s. 72 of the Finance (1909-10) Act, 1910.

The appellant was a British subject. In 1900 she married a Mr. Price, with whom she lived for many years in England. Subsequently she separated from her husband and left England in 1908. During the years respectively ended April 5, 1911, and April 5, 1912, the appellant resided apart from her husband in France, and had no residence in, and did not come to, the United Kingdom. On June 14, 1912, the marriage of the appellant with Mr. Price was on his petition dissolved by a decree of the Divorce Court in England.

On March 12, 1914, the appellant married in Paris Mr. Brooke, and they thereafter lived in France, where the appellant had, up to and including the date of the hearing of the appeal against the assessment, a residence which early in the war came to be in the occupation of the Germans. In October, 1914, the appellant left France, and had ever since lived in England, either in a furnished flat or a furnished house. When the appellant left France, neither she nor her husband (who joined His Majesty's military forces in the course of the war) had any intention to reside permanently in the United Kingdom, and they always intended to return to France as their place of residence whenever the circumstances admitted of their doing so. The appellant's husband had not had any residence in the United Kingdom, nor had he carried on any trade, business, or profession there since his marriage to the appellant. He had not had any income in the United Kingdom since his marriage beyond his Army pay.

The appellant was entitled under the will of her father, who died in 1895, to a life interest in a share of his residuary estate, and was restrained from anticipating that interest. The investments representing the residuary estate were all British and stood in the

names of the trustees of the will, who were British subjects resident in England. The trustees had year by year received all the income derived from the appellant's share less income tax which was deducted at the source, and they paid the amounts received by them to the appellant's bankers in England for the credit of her account. Nearly the whole of the income of the appellant during the year ended April 5, 1911, was received from her share of her father's estate, and that income and the rest of her income for that year were received by her after the deduction of income tax at the source.

For the purpose of the super-tax to be charged for the year ended April 5, 1912 (the year in question in this case), it was not denied that the appellant received a notice requiring her to make a return of her total income from all sources for the year ended April 5, 1911. The appellant declined to make a return on the ground that no assessment to super-tax in respect of her total income fell to be made. The assessment of 11,000*l.*, or 8000*l.* net, was made upon her on March 15, 1915, when she was in England, and notice of the charge was served upon her in England.

On May 18, 1915, the appellant by her solicitors gave notice of appeal against the assessment, and stated that the grounds of appeal would include the following, namely: "That the said Marion Brooke is not an individual liable to super-tax; that she is not liable to be assessed to super-tax on account of the total income as mentioned in the said assessment or any of it, and that the said Marion Brooke is a married woman living with her husband and is resident out of the jurisdiction and was not resident in the jurisdiction during any part of the year of assessment; and that the said assessment is bad in law."

In due course the Commissioners issued their precept to the appellant requiring a schedule to contain particulars of her total income from all sources for the year ended April 5, 1911, and on July 5, 1915, her solicitors rendered certain particulars of her income, without admitting any liability on her part either to super-tax or to render any account of her income.

It was agreed in the course of the hearing of the appeal before the Commissioners that for the purposes of this case, in the event of the appellant being held to be liable to be chargeable with and assessable to the super-tax, the appropriate total income of the appellant,

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estimated in the manner prescribed by s. 66 of the Finance (1909-10) Act, 1910, was 9864*l.*, and that the assessment would fall to be reduced to that sum.

The Commissioners held that the super-tax should be charged to the appellant and an assessment made upon her for the year ended April 5, 1912, in respect of her duly estimated total income from all sources in the United Kingdom, and they so held because they were of opinion that any individual, wherever resident, whose total income in the United Kingdom when estimated in the manner prescribed by the Finance (1909-10) Act, 1910, exceeded 5000*l.*, was chargeable in respect of that income with the super-tax. The Commissioners reduced the assessment to 9864*l.*, less the statutory allowance of 3000*l.*, that is to say, to 6864*l.* net.

Atkin J. held that Mrs. Brooke was chargeable to super-tax and dismissed the appeal from the Commissioners. Mrs. Brooke appealed. The appeal was heard on December 12, 1917.

Disturnal, K.C., and *A. M. Latter*, for the appellant. The material sections of the Finance (1909-10) Act, 1910, upon which the question turns, begin with s. 66, which creates the super-tax. By sub-s. 1 of that section the super-tax is payable "in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*"; and by sub-s. 2, for the purposes of the super-tax the total income of any individual from all sources is to be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. Sects. 69 to 71 inclusive deal with ordinary income tax. Sect. 72 takes up the super-tax and enacts special provisions for its assessment. Some limitation, it is submitted, must be placed upon the meaning of the words "any individual" in s. 66, sub-s. 1. They cannot have been intended to refer to every person in the world. The rule of construction applicable in such a case is that laid down by Lord Esher M.R. in *Colquhoun* v. *Heddon*. (1) He there said: "Unless Parliament expressly declares otherwise . . . . the proper construction to be put on general words used in an English Act of Parliament is, that

(1) (1890) 25 Q. B. D. 129, 134.

Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction." A further rule of construction applicable to this case is that a subject is not to be taxed without clear words for that purpose : *Tennant* v. *Smith*. (1) It is submitted that for the purpose of the super-tax a British subject permanently resident abroad is not subject to the jurisdiction of Parliament. If the Act of 1910 is to be held to cover every individual a foreigner resident here would be taxed in respect of property situate abroad. It is submitted that a British subject permanently resident abroad is put on the same footing as a foreigner resident here. There is nothing in the Act to show that the super-tax is chargeable upon persons permanently resident out of the jurisdiction. By sub-s. 6 of s. 72 all the provisions of the Income Tax Acts relating to persons chargeable and the collection and recovery of duty are, so far as they are applicable, made applicable to the charge, assessment, collection, and recovery of the super-tax. By s. 39 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), temporary absentees from Great Britain are to be charged as residents. By s. 106 machinery is provided for charging the duty in the district in which the person charged usually resides or carries on business. Sect. 100 contains schedules under which the various kinds of property are to be classed. Sect. 41 provides that non-residents are to be charged in the names of their factors or agents. By s. 42 trustees or agents of persons of full age resident in Great Britain are not to be required to do more than deliver lists of names and residences of such persons. Sect. 44 empowers trustees to retain the duties charged upon them out of trust moneys in their hands. The basis of ordinary income tax is property, but in the case of the super-tax it is the individual whose total income from all sources exceeds the specified amount. The super-tax being by s. 66 chargeable on the total income from all sources, the machinery provided by the sections of the Act of 1842 for the assessment to income tax is in no sense applicable to the assessment to the super-tax in the case of a person permanently resident abroad,

(1) [1892] A. C. 150, 154.

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Sub-s. 2 of s. 72 of the Act of 1910, which provides for the making of a return by the agent of a non-resident, must be construed as applying only to persons temporarily residing abroad: see s. 66, sub-s. 2 (*c*). The trustee for a person permanently resident abroad may possibly have little knowledge of the income of his cestui que trust beyond the amount of the income which passes through his hands, and yet he is required by the section to make a full return of his total income, and a penalty is imposed upon him in the event of his failure to do so.

Further, inasmuch as the whole income of the appellant is derived from investments in respect of which income tax is deducted at the source (see s. 88 of the Act of 1842), she is not chargeable to income tax. If the provisions of the Income Tax Acts be looked at it will be seen that, with certain exceptions, either the person sought to be charged must be resident or the property must be situate within the jurisdiction. When the "total income" of an individual has to be considered that limit is got rid of. If a person is resident within the jurisdiction he can of course be required to make a return of his total income. In the case of a company the person directly assessable to income tax is the company and not a shareholder, and when an assessment has been made upon the company no further assessment can be made upon the shareholder.

[SWINFEN EADY L.J. It was decided in *Ashton Gas Co.* v. *Attorney-General* (1) that where a company pays income tax it pays it on behalf of the shareholder.]

The appellant relies on *Purdie* v. *Rex.* (2)

[SWINFEN EADY L.J. Is that case consistent with *Ashton Gas Co.* v. *Attorney-General?* (1)]

It is submitted it is. Income tax is part of the profits of a company available for dividend: *Johnston* v. *Chestergate Hat Manufacturing Co.* (3), and when deducted the shareholder is not liable for it again, but can obtain an abatement in respect of it if his income comes within the amount prescribed by s. 163 of the Act of 1842. It was suggested that the provision in sub-s. 2 (*c*) of s. 66 for a deduction in the case of a person in the service of the Crown abroad was an indication that the super-tax was chargeable on persons resi-

(1) [1906] A. C. 10. (2) [1914] 3 K. B. 112.
(3) [1915] 2 Ch. 338.

dent abroad. But a person in the service of the Crown may, and probably would, have a residence here, and would therefore be taxable as a resident here. But for that provision he would not have obtained an allowance for his expenses abroad. It is submitted, therefore, that Atkin J. was wrong in holding that the appellant was chargeable to the super-tax. [They also referred to *Brooks* v. *Inland Revenue Commissioners* (1); Income Tax Act, 1842, s. 147; s. 190, Sched. G, Form XVII.; Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2; and Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 34), s. 24.]

Sir Gordon Hewart, S.-G., and *T. H. Parr*, for the Commissioners, were not called upon.

SWINFEN EADY L.J. This is an appeal by Mrs. Brooke from a decision of Atkin J. on a special case stated under the Income Tax and Finance Acts, and it raises a question whether the appellant is liable to be charged for super-tax. She was assessed by the Special Commissioners, who stated a case for the opinion of the Court, and the learned judge upheld the assessment and decided that she was liable to be assessed. From that judgment Mrs. Brooke appeals, and the appeal raises the very short point whether in the case of a person whose total income in the United Kingdom exceeds 5000*l.*, but who lives abroad, such a person is liable to be assessed in this country to super-tax. The question depends on the construction of the Income Tax and Finance Acts. It appears from the special case that the appellant, Mrs. Brooke, was formerly a Mrs. Price, a British subject; and she is the daughter of the late Mr. John Peter Robinson, a draper of Oxford Street. She married first Mr. Price and lived in England with him for many years. Subsequently she separated from him and left England. The year with which we have to deal in the present case, and in respect of which the assessment has been made upon her, is the year ending April 5, 1912. During no part of that year was she residing in England; she was residing apart from her husband in France, her husband being domiciled in England. She has been assessed upon a total income for the year ending April 5, 1912, estimated in accordance with the provisions of the statute to which I will call

(1) [1914] 1 K. B. 579, 587.

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attention directly; and her income was arrived at as being 9864*l.* From that she is entitled to a reduction of 3000*l.*, leaving the income for that year upon which super-tax is assessed at 6864*l.* That is an agreed figure. The parties raise no question on this appeal with regard to the amount, but the appellant denies that she is liable to be assessed to super-tax at all. The ground upon which the appeal is based is that she was at all material times residing out of the United Kingdom, and it is said that, according to the true construction of the Act, it cannot have been intended, notwithstanding its wide and general language, to charge persons resident abroad with super-tax.

The super-tax was imposed by the Finance (1909-10) Act, 1910 (I will call it for short the Finance Act, 1910), and it is provided for by Part IV. of that statute. Sect. 65 fixes the rate of income tax for the year beginning April 6, 1909, and then s. 66, sub-s. 1, provides that "In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence in every pound of the amount by which the total income exceeds three thousand pounds." The language used is very wide, and the contention of the appellant is that some restriction must obviously be placed upon the words "any individual"; and the question is what restriction it should be. Sub-sect. 2 of the same section is: "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." So far that provides that the income is to be arrived at for the purposes of super-tax as it is under the Income Tax Acts. Then follow certain qualifications: "but in estimating the income of the previous year for the purpose of super-tax . . . . (*c*) there shall be deducted in the case of a person in the service of the Crown abroad, any such sum as the Treasury may allow for expenses which in their opinion are necessarily incidental to the discharge of the functions of his office and

for which an allowance has not already been made." I refer to that because it is an indication contained in the Act that it was intended to charge persons abroad as well as persons resident in this country with super-tax. The next section dealing with super-tax is s. 72, and that provides by sub-s. 1 : " The super-tax shall be assessed and charged by the Commissioners for the special purposes of the Acts relating to income tax (in this Act referred to as the Special Commissioners) " ; and then by sub-s. 2 : " Every person upon whom notice is served in manner prescribed by regulations under this section by the Special Commissioners requiring him to make a return of his total income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax under section forty-one of the Income Tax Act, 1842, or section twenty-four of the Customs and Inland Revenue Act, 1890, as representing an incapacitated, non-resident, or deceased person, of the total income from all sources of the incapacitated, non-resident, or deceased person, shall, whether he is or is not chargeable with the super-tax, make such a return in the form and within the time required by the notice." Sect. 41 of the Income Tax Act, 1842, there referred to extends to persons who are trustees or guardians of any person being an infant, married woman, or an insane person, and trustees, factors, or agents of non-residents. The trustees of the will of the testator, Peter Robinson, from whom the appellant derives her income are persons coming within s. 41 of the Act of 1842, and, as representing a non-resident, the appellant, are required to make a return. It was urged that persons in such a position would be unable to make a return as they would not know the total income of the person alleged to be liable to super-tax, but would only know of so much of the income as they paid over as trustees, and therefore it was said that they could not make a return. That is not well founded. They obviously can make the return and have to make the return. They have to make the return so far as they are able, that is to say, so far as the facts are within their knowledge ; and although there is a penalty upon a person not making a return, the penalty is by sub-s. 4 only upon any person who " without reasonable excuse fails to make any return." Obviously a trustee can only make a return so far as the facts are within his knowledge, and he would

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have reasonable excuse for not making any further or other return; but so far as he is able, and so far as the facts are within his knowledge, it is his duty to make a return within sub-s. 2. And as a trustee for a non-resident is, amongst others, required to make a return, that forms a clear indication that it was intended that this tax should be imposed upon non-residents. The other material provisions of the Act are these. Sub-s. 6 of s. 72 enacts that "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section"; sub-s. 7 provides for the time within which an assessment may be made, and says: "The Special Commissioners may amend any assessment made by them under this section, or make an assessment or an additional assessment, during any time within the year of assessment, or within three years after the expiration thereof"; and then s. 96, sub-s. 4, provides that "Part IV. of this Act shall be construed together with the Income Tax Acts, 1842 and 1853, and any other enactments relating to income tax, and those enactments and Part IV. of this Act are in this Act referred to as the Income Tax Acts."

Super-tax, as imposed by this statute, is merely an additional income tax—that was pointed out in *Bowles* v. *Attorney-General* (1); and it is charged in respect of the income of any individual. The question was considered by the House of Lords in *Colquhoun* v. *Brooks* (2) under the Income Tax Acts as to the limit to be placed on the wide language of those Acts; and Lord Herschell dealt with it in this way: "Reliance was placed upon the decisions under the Legacy and Succession Duty Acts, which have imposed a limit upon the broad language of the enactments subjecting legacies and successions to taxation. But it must be remembered that it was necessary to put some limit upon these general terms in order to bring the matters dealt with within our territorial jurisdiction; without such a limitation, the Legacy Duty Act, for example, would have been applicable, although neither the testator nor the legatee

(1) [1912] 1 Ch. 123. (2) (1889) 14 App. Cas. 493, 503.

nor the property devised or bequeathed was within or had any relation to the British dominions. A construction leading to this result was obviously inadmissible. The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there. If the latter condition be fulfilled, I think it is competent for the Legislature to determine the measure of taxation to be applied in the case of a person so resident." In that particular case there was a person resident in the United Kingdom but engaged in trade entirely abroad, and some of the profits of the trade were received in this country; but it will be observed that the limit there placed upon the application of the Income Tax Acts is that either the taxable income must be derived from property situate within the United Kingdom, or the person whose income is to be taxed must be resident there. After having heard the arguments of the appellant I fail to see why there should be any difference between super-tax and the rest of income tax, or what distinction can be drawn between them. It was urged that super-tax was assessed upon an individual and that ordinary income tax under Scheds. A to E was charged upon property and not upon a person. But the language is often almost identical, as I have pointed out during the course of the argument; and where the duty is paid by a company in respect of the gains and profits of its business it pays the income tax as agent for its shareholders, and in that way it is the shareholders, as the persons beneficially concerned, who bear the burden of the tax. Mr. Disturnal argued that it was only an individual resident here during the year in respect of which the assessment was made that could be charged with super-tax. I pointed out that, apart from the judicial interpretation of the Income Tax Acts to which I referred, the statute itself which imposes super-tax contains the indications to which I have drawn attention that the tax is to be charged upon and paid by persons resident abroad as well as by persons resident in this country. In my opinion the grounds upon which the learned judge below proceeded are sound, and no case has been made out by the appellant for escaping from the operation of the statute. The question is short and simple, and, notwithstanding the full argument which I have heard upon it, I cannot

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bring myself to entertain any doubt that the appellant is liable to be assessed and taxed in respect of super-tax.

WARRINGTON L.J. I am of the same opinion. The only question we have to determine is a very short one. The appellant receives an income the whole of which is derived from property in this country, and is therefore liable to income tax. She was not resident in this country during the year for which the assessment in question was made, namely, the year 1911—12. Is the fact that she was not resident in this country sufficient to excuse her from being liable to super-tax in respect of the same income as that in respect of which she is liable to income tax? That is the only question that we have to determine. There may be other questions under this Act, and I desire carefully to limit what I say to the precise question we have to decide. Sect. 66, sub-s. 1, on which the question really turns, is, reading it very shortly and leaving out everything that is immaterial, as follows: "In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied and paid for the year" in question "in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super-tax)." Looking at those words by themselves, what is there that prevents what seems to me, with all respect, to be the obvious construction, namely, that the super-tax is an additional tax imposed on all incomes exceeding 5000*l.* that are liable to income tax. As I have said, I am confining what I say to this particular case; and I fail to see what there is in the statute to prevent me construing the word "individual" in that section as meaning the person at all events who has paid income tax in respect of his income. That the Act contemplates that mere non-residence shall not excuse a person from the payment of super-tax I think is shown plainly by sub-s. 2 (*c*) of s. 66, which provides in the case of a person in the service of the Crown abroad for the deduction of certain sums in arriving at his total income from all sources for the purpose of super-tax. The same point is emphasized by sub-s. 2 of s. 72. A person who carries on trade in this country but himself resides abroad is charged with income tax in the name of his agent. That is so provided in s. 41 of the Income Tax Act,

1842. He is the person charged with the income tax. He then is plainly pointed at in s. 72 in the reference to persons chargeable or liable to be assessed to income tax as representing, amongst other persons, a non-resident. I do not think there are any other points it is necessary to deal with.

For these reasons I think that, in this case at all events, the appellant is liable to the super-tax in respect of her income, as it is income entirely derived from property in this country. It seems to me, with all respect to the argument we have heard, that it makes no difference for this purpose whether the income tax is deducted at the source under the operation of what Lord Halsbury calls in *Ashton Gas Co.* v. *Attorney-General* (1) the "somewhat difficult and complex machinery which makes the officers of the company officers of the Financial Department of the Government for the purpose of collecting the tax," or whether the tax is directly assessed upon the person in question. The appellant here pays income tax although the tax is deducted at the source, and in my opinion she is liable to pay super-tax also.

SCRUTTON L.J. Like my brothers, I desire to limit myself to the exact facts of this case and to their legal effect, for, like them, I can well understand that other states of facts on this particular section may raise questions which it will be necessary for the Court carefully to consider. The facts here are that a British subject domiciled in England but resident abroad derives all her income, which exceeds 5000*l.* a year, from property in the United Kingdom; and, those being the facts, the question is whether she is liable to super-tax under s. 66 of the Finance (1909–10) Act, 1910. At the time that Act was passed the liability to income tax was, as is summarized by Lord Herschell in the case of *Colquhoun* v. *Brooks* (2), a territorial limit, namely, that either the property from which the taxable income is derived must be situated in the United Kingdom, or the person whose income is to be taxed must be resident there. Under these circumstances Parliament passed an Act imposing in addition to the income tax charged a further charge in respect of the income of any individual exceeding 5000*l.* It is said that those words of s. 66 which impose this additional tax are so wide that they

(1) [1906] A. C. 10, 11. (2) 14 App. Cas. 493, 504.

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must be construed with some limitation for that Parliament cannot have meant to tax an individual who never came near England and had no property in England and had nothing whatever to do with England; and the limitation which is suggested by Mr. Disturnal and Mr. Latter is that the term "individual" must be limited to an individual resident within the jurisdiction in the year in respect of which the assessment was made. The question at once occurs to me, For what reason should Parliament impose the super-tax on one half only of the income tax assessments and not on the other? Why should it impose a super-tax on a person who is resident in the United Kingdom and omit the tax where that from which the taxable income is derived is situated in the United Kingdom? I can see no reason for supposing that the Legislature intended to impose an additional duty of income tax leaving out half the subject-matter on which the original income tax was levied. It would seem far more natural that so far as a person is enjoying the protection of the United Kingdom either by residing there or by having property there he should be liable to super-tax; and therefore Mr. Disturnal fails to satisfy me, in view of the fact that the appellant, though not resident in England, is a British subject deriving all her income from property in the United Kingdom, she is not an "individual" within the meaning of the word in s. 66 of the Act. I am rather strengthened in that conclusion when I find that Parliament in two sections in the same Act made provisions with regard to super-tax that showed it contemplated the tax applying to non-residents, as in s. 72, sub-s. 2, and to persons in the service of the Crown abroad, as in s. 66; sub-s. 2 (*c*). That, in my view, is enough to dispose of this case.

I quite appreciate that there may arise in future cases difficult questions as to the exact position of a company and its shareholders. I am not at present satisfied that the reasoning in *Purdie* v. *Rex* (1) is consistent with the decision of the House of Lords in *Ashton Gas Co.* v. *Attorney-General* (2); but it is not necessary, in my view of this case, to decide that point, because I am quite clear that a company in paying income tax at the source at any rate pays as agent of the shareholders.

It may be necessary in future cases to consider whether, in con-

(1) [1914] 3 K. B. 112. (2) [1906] A. C. 10.

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struing the wide language of s. 66, restriction will have to be made on the meaning of "income" as well as "individual," and whether, in the case of a non-resident, the word "income" may not have to be given a construction limiting its meaning to income arising in the United Kingdom. It is not necessary, however, in this case to decide that; but I mention it to show that I have not overlooked it, and that I am not to be taken as deciding anything on that question.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Nicholson, Patterson & Freeland.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE COURT OF APPEAL.]

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H. NEWSUM & CO., LIMITED *v.* BRADLEY AND OTHERS.

Ship—Abandonment at Sea—Ship and Cargo subsequently salved—Right of Shipowner to Freight.

The defendants' ship while on a voyage from Archangel to Hull with a wood cargo was attacked by an enemy submarine. The master and crew were compelled by the enemy to leave the ship in the boats. The enemy attempted, but failed, to sink the ship, and she was subsequently found in a derelict condition by a British patrol boat and brought with her cargo to the Scottish coast, and was there taken possession of by the receiver of wrecks. On the receipt of a telegram from the master that the ship had been sunk by a submarine (which he believed to be the fact) the owners wrote to the ship's agents a letter for communication to the cargo owners stating that the ship had been sunk by an enemy submarine. The plaintiffs, who were the indorsees of the bills of lading, claimed delivery to them of the cargo free of freight on the ground that the defendants had abandoned the prosecution of the voyage:—

Held by Pickford and Bankes L.JJ., that, whether or not the act of the master and crew in leaving the ship under threats amounted to an abandonment by them of the ship, the letter of the shipowners amounted to a clear intimation to the charterers of their inability to carry out their contract and that the plaintiffs were, therefore, entitled to receive the cargo free of freight.

Held, by Sargant J., dissenting, that the act of the master and crew in leaving the ship under threats did not amount to an

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abandonment, and that the letter of the defendants only amounted to a communication of the event that had happened and not to an intention not to perform their contract.

Judgment of Sankey J. [1917] 2 K. B. 112 affirmed on different ground.

APPEAL from the judgment of Sankey J. in an action in the commercial list tried without a jury; reported [1917] 2 K. B. 112.

The plaintiffs were the indorsees of bills of lading for the carriage of a wood cargo in the defendants' steamship *Jupiter* from Archangel for delivery at Hull. The plaintiffs alleged that the defendants had abandoned the prosecution of the voyage, and they claimed a declaration that they were therefore entitled to take delivery of the cargo free from any claim for freight. The defendants counterclaimed for the freight. The bills of lading contained the usual exceptions, including King's enemies and restraint of princes.

The following statement of facts is taken substantially from the written judgment of Sankey J. :—

"The plaintiffs are the indorsees of bills of lading dated Archangel, September, 1916, and signed on behalf of the defendants, the owners of the *Jupiter*, for the carriage of a cargo of wood goods therein specified to be delivered in good order and condition at Hull on payment of freight as per charterparty, dated July 18, 1916. The *Jupiter* duly proceeded on her voyage, but while off the coast of Scotland she was attacked by a German submarine upon October 7. The enemy compelled the crew to take to their boats under threats from loaded revolvers. They then placed bombs on board the vessel, exploded them, and proceeded to tow the crew towards land, but cast them off after going a certain distance. The last the crew saw of the vessel led them to believe that she was sinking. They were picked up by a trawler and taken into Aberdeen, where the captain telegraphed to the owners on October 8: 'Ship sunk yesterday; submarine; arrived all well; Sailors' Home.' The owners thereupon on October 9 wrote to the brokers of the ship, who wrote to the plaintiffs in these terms: 'We have the following letter from owner of this steamer to-day, which kindly note: "It is with very great regret I advise you of the loss of my s.s. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last.

The crew have all been landed safely. Will you kindly advise charterers and oblige." Yours faithfully.'

"Owing to the fact, however, that the cargo was of wood the efforts to sink the ship were unavailing. She was found a water-logged derelict and was towed by patrols of His Majesty's Navy with great difficulty into Newhaven, near Leith; but her condition was such that it was found necessary to beach her, and she was taken possession of on October 11 by the receiver of wrecks, to whom the salvors handed her over. At 3.30 in the same afternoon the plaintiffs' solicitors telegraphed to the receiver to the following effect:—'Receiver of wreck, Leith. Steamer *Jupiter*. We represent owners (of) cargo: understand she is now lying at Newhaven. Please note our clients' claim. Elect take possession their property where steamer now is. Please do not allow cargo to be dealt with except with our sanction. Please do anything necessary protect property for our clients.' The owners of the vessel at Hull heard the same day that she had been saved, and they received a telegram from the plaintiffs' solicitors about 2.45 in the afternoon saying: '*Jupiter*. We represent owners (of) cargo this steamer recently brought into Leith derelict. Our clients elect take possession their property where now lying. Please note.' One of the owners of the vessel left for Leith that evening, and went down to the beach at Newhaven as soon as he reached that place, but could not get aboard. The following morning he saw the senior naval officer, told him he had come for the ship, and said: 'I am glad to have her back.' The officer replied: 'You have not got her back; she belongs to the receiver of wreck.' The owner was sent on board in a torpedo-boat, and left behind an engineer to represent him. By arrangement between the parties the vessel eventually proceeded to Hull and delivered her cargo, but this was done without prejudice to their rights on October 12."

Sankey J. held that the master and crew had abandoned the ship in such circumstances as to indicate an intention not to perform the contract of affreightment, and that the plaintiffs were therefore entitled to receive the cargo free of freight.

The defendants appealed.

MacKinnon, K.C., and *Lewis Noad*, for the defendants.

R. A. Wright, K.C., and *Le Quesne*, for the plaintiffs.

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The arguments and the cases cited were the same as in the Court below and do not need repetition here.

PICKFORD L.J. This is an action by the owners of cargo on the ship *Jupiter* claiming a declaration that they are entitled to receive delivery of the cargo without payment of freight. The declaration asked for was that they were entitled to receive the cargo at Leith because it was brought there in the first instance, but it was afterwards brought to the port of Hull under an agreement which provided that this should be done without prejudice to the rights of either party. The plaintiffs are the indorsees of the bills of lading for the cargo, and are also charterers of the *Jupiter*, and the charter and bills of lading were for the carriage of a cargo of wood goods to be delivered at Hull on payment of freight as per charter. On the voyage the *Jupiter* was met off the coast of Scotland by a submarine, the crew of which compelled the crew of the *Jupiter* by threats of shooting them to take to their boats; they placed and exploded bombs on the *Jupiter* and towed away the crew for five miles; the last that the crew saw and heard of the *Jupiter* made them think that she had sunk. The crew were picked up by a trawler and taken to Aberdeen, and, under the impression that the ship was gone, the master on October 8 telegraphed to the owners that she was sunk. There is no doubt that he and the crew thought this to be the fact and that they had no intention of rejoining her. The owners on receipt of that telegram wrote to the brokers of the ship, who wrote to the plaintiffs as follows: "We have the following letter from owner of this steamer to-day, which kindly note. 'It is with very great regret I advise you of the loss of my s.s. *Jupiter*, which steamer was sunk by enemy submarine on Saturday last. The crew have all been landed safely. Will you kindly advise charterers and oblige.' Yours faithfully." The effect of this letter is the same as if it had been written direct by the owners to the charterers. On October 11 it came to the knowledge of both the owners and charterers that the ship was not sunk but had been taken to Leith, and at 2.37 P.M. on that day the cargo owners' solicitors telegraphed to the shipowners: "*Jupiter*. We represent owners of cargo of this steamer recently brought into Leith derelict. Our clients elect to take possession their property where now lying. Please note";

and at the same time on the same day they telegraphed to the receiver of wrecks: "Receiver of wreck, Leith. Steamer *Jupiter*. We represent owners (of) cargo: understand she is now lying at Newhaven. Please note our clients' claim. Elect take possession their property where steamer now is. Please do not allow cargo to be dealt with except with our sanction. Please do anything necessary protect property for our clients." On the same day about 10.30 information was received by the shipowners that the ship had been taken to Leith. They took no steps until they received a telegram from the solicitors to the cargo owners, which telegram they took to their own solicitors, who wrote to the plaintiffs' solicitors in the following terms: "We act on behalf of the owners of the steamship *Jupiter*, and your telegram of this afternoon has been handed to us for reply. Immediately upon her arrival our clients retook possession of the vessel, and this prior to the reception of your telegram. . . . ." That was a misapprehension, for possession had not been taken by the owners. If the owners had taken possession before receipt of the telegram a very different state of things would have arisen. The letter goes on: "We think you will appreciate your clients have no election to take possession of their property where it now lies. On the contrary, our clients have already been advised that there is no great difficulty in bringing the vessel and her cargo to Hull, which is the destination under the charter and bills of lading. Please note that the cargo will be brought forward accordingly and the freight will be carned and claimed in due course." One of the owners arrived at Leith that evening, but was not allowed to go on board; he went on board on the morning of the 12th and left an engineer behind him to attend to the repairing of the engines. Up to that time there is no doubt that the owner had not resumed possession. Then came an agreement by which the ship proceeded to Hull and delivered her cargo there. The owners did not in fact get possession of the *Jupiter* until October 28.

Upon these facts the cargo owners say that they are entitled to the delivery to them of the cargo without payment of freight, because they received an intimation from the shipowners that they were not going to perform their contract and that they had accepted the intimation, as they were entitled to do. The question is whether the acts or words of the shipowners or their servants were such as

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entitled the cargo owners to take the cargo where it lay without paying freight first. Up to a point the question is covered by authority. I agree with counsel that it is no use looking at authorities unless we look at the principle which underlies them; and I think that Gainsford Bruce J. in *The Arno* (1) has correctly stated the principle in the following passage: "The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract." I will only add that one might add to the words "intention not to perform" the further words "inability to perform." It has been decided in cases which are binding upon us that the leaving of a ship by the master and crew owing to stress of weather with no intention of returning to her entitles the cargo owner to the goods without payment of freight; this was held in *The Cito* (2) and *The Arno.* (3) In this case Sankey J. has held that the leaving of the ship by the master and crew under stress of the King's enemies, which is also an exception under the charterparty, is the same as leaving her under stress of weather, and some support is afforded to his decision by the case of *The W. S. Caine* v. *Bellglade* (4), because the facts there were that the crew were driven off by Germans who failed to sink the ship, and Swinfen Eady L.J. drew attention to the possible distinction between their being forced by enemies to leave their ship and being forced by stress of weather to abandon it. It is not necessary to determine that point, though I do not dissent from Sankey J.'s determination of it. Assume that the driving off of the crew was not an abandonment by them of the ship because there was no exercise of an act of volition on their part. When they were cast off by the enemy they were picked up and taken to Aberdeen; it is clear they had then no intention of returning to the ship which they believed to be at the bottom of the sea, and the master in fact telegraphed to the owners that the ship was sunk. The owners then sent the letter to which I have already referred. This was communicated to the charterers, and

(1) (1895) 72 L. T. 621, 622.
(2) (1881) 7 P. D. 5.
(3) 72 L. T. 621.
(4) Reported in Lloyd's List, August 3, 1915.

seems to me to amount to a clear intimation to the charterers that the shipowners considered themselves to be in a position of inability to carry out their contract. I agree that they did not say they would not carry it out if they could. But if this is not clear, I think the case comes within the principle that if a person sends a letter which is ambiguously worded, he is bound by it. I agree that if a shipowner met a man in the street and told him that his ship was sunk, it would only be a statement of fact, but on the facts of the present case there was, as between two business men, a clear intimation that the shipowners were not in a position to carry out their contract. On the facts, even assuming that the learned judge was wrong in his view that leaving the ship under duress of enemies fell within the same principle as leaving it on account of perils of the sea, there was ample evidence of a notice by the shipowners to the charterers that they were not going to carry their contract out. For these reasons I think that the appeal must be dismissed.

BANKES L.J. I agree. The learned judge below decided this case on general principles and not on decided cases. I think he was right and will myself endeavour to decide it on the same grounds. What is the general principle which is here applicable? It is that if one party to a contract repudiates it and declines to perform it, the other party may accept the repudiation. In *Freeth* v. *Burr* (1) Lord Coleridge C.J. used language which was approved of in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) and in *General Bill Posting Co.* v. *Atkinson.* (3) He spoke of acts or conduct evincing an intimation of an intention no longer to be bound by the contract, and I think a shipowner may do this by intimating that he is unable or unwilling to perform it. It is true that in certain cases the question has arisen whether the acts or language relied on amounted to an unequivocal declaration of unwillingness or inability to perform. In *Johnstone* v. *Milling* (4) Bowen L.J. said: "The claim being for wrongful repudiation of the contract it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention." I think that

(1) (1874) L. R. 9 C. P. 208.
(2) (1884) 9 App. Cas. 434.
(3) [1909] A. C. 118, 122.
(4) (1886) 16 Q. B. D. 460, 474.

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the letter of October 9 from the shipowners to the brokers, written for the purpose of being communicated to the cargo owners, amounted, in the language of Bowen L.J., to "a declaration of intention not to carry out the contract" or that it was "such that the defendant was justified in inferring from it such intention." It is not a mere statement that their vessel has been lost and that, when they are in a position to do so, they will say what they are going to do. It accepts the statement that the vessel is at the bottom of the sea. It would be difficult to find language more clearly expressing the impossibility of the shipowners fulfilling their contract. If that is its true interpretation it gave the cargo owners the right of accepting the repudiation. On the 11th the owners heard that their vessel was not sunk and on the same day they received a telegram from Messrs. Crump & Son in which the holders of the bill of lading say that they have elected to treat the contract as at an end. If they were right in taking that course, the contract is at an end not because the adventure has been abandoned but because of the communication which the shipowners themselves made. I do not desire to say whether a distinction can be drawn between the abandonment of a ship by her crew at their own free will, and abandonment where they are driven from her by threats; apparently Sankey J. thought there was no distinction between the two, but I express no opinion on that point.

SARGANT J. As I am differing from my colleagues and from the judge below, I express my view with great hesitation. In my opinion the case entirely depends on whether there has been an abandonment by the shipowners of the contract, and I take the test to be whether the acts and conduct of the shipowners or of their agent evince an intention no longer to be bound by the contract. Was there an abandonment by the master or a subsequent abandonment by the shipowners in view of the letter of October 9? As to the first point, Sankey J. says: "The enemy compelled the crew to take to their boats under threats from loaded revolvers." It is said to be the same thing as if the crew had abandoned the vessel under stress of weather, but in my judgment the cases are quite different. In the one case the master comes to the conclusion that the voyage cannot safely be performed, and because she is about to sink he and

the crew quit the vessel. The question was well put by Gainsford Bruce J. in *The Arno* (1), where he says: "The real question is whether, so far as the owner of the ship is concerned, there was on his part, or on the part of his servants, an act done so clearly indicating his intention not to carry out the contract as to entitle the owners of the cargo to treat that act as putting an end to the contract," and by Brett L.J. in *The Cito.* (2) This shows clearly that abandonment by stress of weather takes place because the master comes to the conclusion that the contract cannot be performed. He orders the crew to the boats because the enterprise has failed; and in giving this order there is an element of volition and of the exercise of judgment.

In the present case, however, when the crew left the vessel because the enemy pointed their revolvers at them, they did not leave it because they thought the vessel would be destroyed, although such an event was very probable, but to avoid being shot. There was no judgment or volition in the matter, nor any "abandonment" except in the sense of leaving the ship. It is just as if they had been bound hard and fast and thrown into the boats.

But my brethren think there was an abandonment by what subsequently took place in the sending of the letter of October 9. In my opinion, however, that letter did not amount to more than a communication of news of common interest, and I do not see how there can be extracted from it an intimation of intention not to perform their contract on the part of the shipowners. If the ship had gone to the bottom, as was thought, the whole substratum of the contract would have utterly disappeared, and it would have been futile for the shipowners to intimate an intention not to be bound. I am of opinion that the appeal should be allowed.

Appeal dismissed.

Solicitors for plaintiffs: *W. A. Crump & Son.*

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis.*

(1) 72 L. T. 622. (2) 7 P. D. 5.

W. J. B.

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Nov. 14.

THE KING *v.* THE JUSTICES OF CARNARVONSHIRE. *Ex parte* THE COUNTY COUNCIL OF CARNARVON.

Rates—County Rate—Parish aggrieved—Altered State of Value of Property—Cause of Appeal—Time for giving Notice of Appeal—County Rates Act, 1852 (15 & 16 *Vict. c.* 81), *s.* 22.

By s. 22 of the County Rates Act, 1852, if the overseers of the poor, now the parish council, have reason to think that their parish is aggrieved by any rate made on the basis of the county rate on account of the altered state of the value of the property assessed or any part thereof, they may appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen.

On April 27, 1916, a county council resolved that a county rate should be levied in two instalments and that a certain parish should be taxed in an amount in the pound on the then assessable value of the parish towards the first instalment, and issued their precept to the guardians of the union comprising the parish requiring them to pay the amount specified in respect of each parish in the union. The amount so required was paid in the following September.

On June 14, 1916, the occupiers of certain property in the parish gave to the assessment committee of the union notice of objection to their assessment to the poor rate.

On October 19, 1916, the county council resolved that the second instalment of the county rate should be levied; a precept was issued to the guardians of the union as before, and the amount levied was paid by the guardians in nearly equal sums on February 19, March 23, and March 31, 1917.

On February 17, 1917, the union assessment committee reduced the assessment of the property of the objecting occupiers. On February 24 notice was given to the parish council that the assessment of the parish had been reduced.

On March 5 the parish council, as being aggrieved by the county rate made on April 27, 1916, gave notice of appeal to quarter sessions against the rate on the ground that the value of the property in the parish had altered and that the county rate basis was unfair. The Court of quarter sessions heard the appeal and ordered that the county rate basis for the parish should be reduced and that the amount overpaid by the parish in respect of both instalments of the rate should be repaid.

On a rule nisi for a certiorari obtained by the county council to remove these orders of quarter sessions into the King's Bench

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Division on the ground that the quarter sessions had no jurisdiction to hear the appeal or to order the repayment :—

Held, that the cause of appeal arose on February 17, 1917, when the union assessment committee reduced the assessment of the objecting occupiers ; that the notice of appeal was therefore in time, and that the quarter sessions had jurisdiction to hear the appeal.

West Riding of Yorkshire County Council v. *Middleton Parish Council* [1906] 2 K. B. 157 and *Glamorgan County Council* v. *Barry Overseers* [1912] 2 K. B. 603 considered.

Held, also, that so much as was overpaid by the parish before October, 1916, could not be ordered to be repaid.

Glamorgan County Council v. *Barry Overseers* [1912] 2 K. B. 603 followed.

Semble, so much as was overpaid by the parish before the date of the notice of appeal cannot be ordered to be repaid.

RULE NISI for a writ of certiorari to the justices of Carnarvonshire to remove into the King's Bench Division orders of quarter sessions made on March 29 and July 5 and 6, 1917, on an appeal by the overseers of the parish and parish council of Llanddeiniolen against a county rate made on April 27, 1916.

By the order of March 29 it was ordered that the county rate basis for the said parish should be amended as hereinafter appears. By the order of July 5 and 6 it was ordered that the sum of 484*l.* 16*s.* 6*d.* should be refunded by the Carnarvon County Council to the said parish.

The ground on which the rule nisi was moved was that the quarter sessions had no jurisdiction to hear the matter or to order the repayment.

The facts were these : On April 1, 1916, the parish was assessed for the purposes of the county rate as follows :—Net annual value, 25,177*l.* ; assessable value, 23,578*l.* 10*s.* The parish contained certain slate quarries.

On April 27, 1916, at a meeting of the Carnarvon County Council it was resolved that a county rate of 2*s.* 6½*d.* in the pound should be levied during the current year ; it was further resolved that a county rate for 1*s.* 3½*d.* in the pound should be then made payable on or before July 1, 1916 ; and it was ordered that the several parishes including the parish of Llanddeiniolen should respectively be taxed and assessed to the general county rate of 1*s.* 3½*d.* in the

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amounts therein stated. The amount of the taxation and assessment for the parish was 1522*l.* 15*s.* 7*d.*, being 1*s.* 3½*d.* in the pound on the then assessable value of 23,578*l.* 10*s.*

The precept for the rate was, so far as material, in these terms : —

" County of Carnarvon to wit.

" To the Guardians of the Carnarvon Union.—These are to require you the guardians of the Carnarvon Union, from and out of the moneys paid into the hands of the treasurer of your union for the uses and purposes of the said union, to pay or cause to be paid, on or before July 1, 1916, into the hands of Morris Hugh Williams, of Carnarvon, in the said county, treasurer of the said county, appointed to receive the same, the sum of 10,189*l.* 18*s.* 7*d.* being the amount of the several and respective sums of money hereunder set down and expressed opposite to and against the names of the several parishes . . . . comprised within your said union, the said several sums being respectively charged and assessed thereon as the proportion of the several parishes . . . . towards (*a*) the general county rate at 15½*d.* in the £ viz. . . . . Dated this 27th day of April, 1916. John Roberts, Clerk to the County Council."

The sum set down opposite the name of the parish of Llanddeiniolen was 1522*l.* 15*s.* 7*d.*

This precept was served on the guardians of the Carnarvon Union, and the entire amount payable thereunder was paid by the said guardians to the county treasurer before the end of September, 1916.

On June 14, 1916, the occupiers of the quarries in the parish gave to the assessment committee of the Carnarvon Union notice of objection to their assessment to the poor rate. On September 22, 1916, this objection came before the assessment committee and was adjourned for consideration.

On October 19, 1916, the Carnarvon County Council passed a resolution that a county rate of 1*s.* 3*d.* in the pound should be then made payable on or before December 2, 1916. The amount of the taxation and assessment for the parish of Llanddeiniolen was 1473*l.* 13*s.* 2*d.*, being 1*s.* 3*d.* in the pound on the assessable value of 23,578*l.* 10*s.* A precept for a sum of 9712*l.* 4*s.* 6*d.* was served upon the guardians of the Carnarvon Union.

In the meantime, by arrangement with the assessment committee of the Carnarvon Union, the county rating committee instructed a valuer to value the quarries. The result of the new valuation was to reduce the figures of the parish to the amounts following, namely, net annual value, 21,362*l.* 10*s.*; assessable value, 19,763*l.* 10*s.*

On February 10, 1917, these figures were communicated to the clerk to the guardians of the Carnarvon Union, and on February 17, 1917, the assessment committee of the Carnarvon Union reduced the assessment accordingly.

On February 19, 1917, the guardians of the Carnarvon Union paid to the county treasurer the sum of 3000*l.* in respect of the precept of October 19, 1916.

On February 24, 1917, notice was given to the parish council of Llanddeiniolen that the assessment of the parish had been reduced. On March 5 the parish council, as "being aggrieved by the county rate now current made on April 27, 1916," gave notice of appeal to quarter sessions "against the said rate" on the grounds (1.) that it had been made on a county rate basis which was unfair; (2.) that the value of the property in the parish had altered.

On March 23, 1917, the guardians of the Carnarvon Union made a further payment of 3000*l.* to the county treasurer in respect of the precept of October 19, 1916.

On March 29, 1917, an order was made by quarter sessions that the county rate basis for the parish should be amended as follows: Net annual value, 21,362*l.*; assessable value, 19,763*l.* 10*s.*

On March 31, 1917, the balance of 3712*l.* 4*s.* 6*d.* was paid to the county treasurer by the guardians of the Carnarvon Union.

At their sitting on July 5 and 6, 1917, an order was made by quarter sessions that a sum of 484*l.* 16*s.* 6*d.* (representing the rate of 2*s.* 6½*d.* in the pound upon 3815*l.*, the difference between 23,578*l.* 10*s.* and 19,763*l.* 10*s.*) should be refunded by the county council to the parish council.

A rule nisi for a certiorari having been obtained as aforesaid by the county council to bring up these orders of the quarter sessions,

Ryde, K.C., and *J. Oddy* (*Artemus Jones* with them) showed cause. The first question is whether the notice of appeal of March 5,

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1917, was in time. That depends on the meaning of s. 22 of the County Rates Act, 1852 (1), which allows an appeal "at the next quarter sessions of the peace after such cause of appeal shall have arisen." If the quarter sessions held in March, 1917, were the next quarter sessions after the cause of appeal had arisen, the justices had jurisdiction to make the order of March 29, 1917, reducing the assessment of the parish; and, subject to the second

(1) County Rates Act, 1852 (15 & 16 Vict. c. 81), s. 22: "If the . . . . overseer or overseers of the poor [now the parish council; see s. 6 of the Local Government Act, 1894] . . . . of any parish . . . . shall at any time thereafter have reason to think that such parish . . . . is aggrieved by any rate or assessment . . . . hereafter to be made upon the basis or standard hereinbefore mentioned . . . . on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such . . . . overseer or overseers . . . . to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen . . . . and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions, or omissions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them the said justices shall appear fair, just, and equitable . . . ."

Sect. 23: "From and after the passing of this Act, the county rate or rates made upon any parish . . . . shall be paid, and shall and may be levied, recovered, and received, notwithstanding any appeal or appeals may have been made to the quarter sessions of the peace against any such rate or rates, and such rate or rates shall continue to be raised, levied, and received until the decision of the justices shall be made upon such appeal or appeals: Provided always, that if upon the hearing of any such appeal or appeals the Court of quarter sessions of the peace shall order any rate or assessment to be set aside, decreased, or lowered, and it shall appear to the said Court that any parish . . . . hath, previously to the determination of such appeal or appeals, paid any sum or sums of money in consequence of such rates or assessments which ought not to have been paid or charged therein, then and in every such case the said Court shall order such proportion of such sum or sums of money as shall have been so paid by any . . . . parish . . . . subsequently to the notice which shall have been given of such last-mentioned appeal or appeals, to be repaid and returned to the . . . . parish . . . . which . . . . hath paid the same . . . . out of the general rate of the county in which the cause of appeal shall have arisen."

question to be mentioned later, they had jurisdiction to make the order of July 5 or 6, 1917, also. The first question therefore resolves itself into this : When did the parish's cause of appeal arise ? The county council contend that it arose on April 27, 1916, when the rate was made, and they claim that *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) and *Glamorgan County Council* v. *Barry Overseers* (2) support their contention. But in April, 1916, no one knew that the parish was over-rated. There was no cause of appeal until this was known. It was not known until February 24, 1917, when the parish council was informed that the assessment was reduced by 3815*l.* Then they first learned that the parish had overpaid, or would have to overpay, the county treasurer to the extent of 484*l.* 16*s.* 6*d.* Then their cause of appeal arose, and they gave their notice of appeal to the next quarter sessions. The case of *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) is no authority against this view. In facts very similar to those in the present case Ridley J. intimated that the date when the union assessment committee reduced the assessment to the poor rate—in the present case February 17, 1917—was the date when the parish's cause of appeal arose. If that be the true view, the quarter sessions in March, 1917, were still the next quarter sessions. The case of *Glamorgan County Council* v. *Barry Overseers* (2) carries the matter no further. The decision was that the cause of appeal arose either when the county rate was made, in which case the notice of appeal in that case was too late, or when the union assessment committee reduced the ratepayer's assessment, in which case the notice of appeal was premature.

Secondly, the county council contend that they did not make one rate of 2*s.* 6½*d.* for the year, but made two rates, one of 1*s.* 3½*d.* on April 27, 1916, and the other of 1*s.* 3*d.* on October 19, 1916, and that the only rate appealed against is that of April 27. As to this contention, the justices have found that there was one rate payable by two instalments, and that finding, being upon a matter within their jurisdiction, cannot be questioned in such a proceeding as this.

Macmorran, K.C., and *L. Mossop*, in support of the rule. The

(1) [1906] 2 K. B. 157. (2) [1912] 2 K. B. 603.

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notice of appeal was out of time. "Where the appeal is against a rate, the 'cause of appeal' would prima facie be upon notice of the rate": *Reg.* v. *Barnet Sanitary Authority* (1), per Blackburn J. The cause of appeal arises when it comes into existence in fact, not when the persons affected awake to its existence. It existed when the rate was made just as much as it did when it was ascertained: *West Riding of Yorkshire County Council* v. *Middleton Parish Council.* (2)

Secondly, there were two rates made. Justices cannot by a mere finding of fact bring within their jurisdiction a case which, if the facts were truly found, would be outside their cognizance. If there were two rates there was no notice of appeal against the second, and the first had been paid before any notice of appeal. In any case, so much as was paid before October, 1916, cannot be repaid: *Glamorgan County Council* v. *Barry Overseers.* (3)

DARLING J. This is a rule nisi for a certiorari to bring up certain orders of a Court of quarter sessions with a view to quashing them on the ground that they were bad. It is said that the quarter sessions were wrong in finding as a fact that only one rate was made, whereas two rates were really made; and that they had no power by so finding to give themselves jurisdiction to deal with the matter. In my opinion it was within their jurisdiction to consider whether there was one rate or two rates, and we cannot in such a proceeding as this interfere with their finding that there was only one rate. The notice of appeal was therefore in time so far as that point is concerned.

There remains the question what was the cause of the appeal. It was, in the words of the statute, "on account of the altered state of the value of the property assessed," and in my opinion, having regard to what was the cause of appeal, the notice of appeal was given in time. The quarter sessions went into the matter and awarded to the parish the return of a sum of money in respect of what the parish had paid on account of the two instalments due under this one rate, and I think Mr. Macmorran is right—and he is supported by the judgment of Lord Alverstone C.J. in *Glamorgan*

(1) (1876) 1 Q. B. D. 558, 561. (2) [1906] 2 K. B. 157.
(3) [1912] 2 K. B. 603.

County Council v. *Barry Overseers* (1)—in contending that the amount which was paid before October, 1916, cannot be recovered. The quarter sessions were therefore wrong in making an order for the payment of a sum which included that amount.

Now if we make an order absolute to quash this order for repayment, that will enable the county council to keep a considerable sum of money to which they are not entitled. If we discharge the rule we fail to give effect to our view that the parish council really is entitled to a portion only of the sum which the quarter sessions have awarded them. The rule for a certiorari will be made absolute. The order of the quarter sessions will then be removed into this Court, and probably then some one will move to quash it, and then the Court may do what we cannot do now, namely, award to each of the parties the amount to which each is entitled. I hope, however, that the parties may be able to arrange this matter without further litigation.

AVORY J. I am of the same opinion. First of all I think that the quarter sessions in this case had jurisdiction to hear and determine this appeal. Under s. 22 of the County Rates Act, 1852, if the overseers of any parish have reason to think that the parish is aggrieved by any rate on account of the altered state of the value of the property assessed, they may appeal to the next quarter sessions of the peace after such cause of appeal shall have arisen. In my opinion the cause of appeal arose when the value of the property assessed assumed an altered state within the meaning of that section. It is clear that in the present case the appeal was made to the next quarter sessions after the decision of the assessment committee which reduced the value of property in this county by the amount of something like 8000*l*.

The next point which was taken by Mr. Macmorran is that there were in fact two rates made, and not one rate, on April 27. Even if that was right, it would not help him upon the question when the cause of appeal arose, because if there were a second rate made in October, then equally for the reasons which I have given the cause of appeal against that rate arose when the assessment committee made the alteration. Of course the notice of appeal might be

(1) [1912] 2 K. B. 603.

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AVORY J.

technically wrong, seeing that it is a notice of appeal against the rate made in April, and Mr. Macmorran therefore might be technically right if he succeeded in showing that there was another rate made in October; but, without deciding the matter as a matter of fact for myself or as a matter of law, I am clearly of opinion that the Court of quarter sessions had jurisdiction to determine whether this rate was one rate made in April, 1916, or whether there were two rates, one made in April and one made in October; and this Court has no jurisdiction by writ of certiorari to overrule the decision of quarter sessions upon that point.

I ought to have said, in order to show that we have not overlooked the authorities, that our decision as to when the cause of appeal arose is not inconsistent with the judgment in the case of *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1), and certainly not inconsistent with *Glamorgan County Council* v. *Barry Overseers* (2), where the Court abstained from expressing any opinion upon the matter. Undoubtedly there are expressions in the judgment of Ridley J. in *West Riding of Yorkshire County Council* v. *Middleton Parish Council* (1) which support the contention that Mr. Macmorran has put before us, but the substance of that judgment is that the date must be calculated from the time when the persons appealing are in fact aggrieved. I think they were in fact aggrieved when the altered state of the value of property in the county was ascertained.

The third point, as to the repayment of the money, arises under s. 23 of the statute. But for the decision of the Court in *Glamorgan County Council* v. *Barry Overseers* (2) I should have liked further time to consider whether Mr. Ryde is not right in his contention that, this being one rate, and the balance of that rate having been paid after the notice of appeal, the Court of quarter sessions might properly order the proportion to be repaid of the sum which has in fact been paid on the whole rate—that is to say, to order the excess to be repaid. If a man has been improperly compelled to pay a larger amount than should properly be paid, it would only be common sense to give the Court power to order repayment of the amount which was improperly paid. But in my opinion the judgment in *Glamorgan County Council* v. *Barry*

(1) [1906] 2 K. B. 157. (2) [1912] 2 K. B. 603.

Overseers (1) precludes me from taking that view, and undoubtedly there are reasons given in the judgment of Lord Alverstone C.J. in that case which have often prevailed in matters of rating, that when once moneys have been paid under a rate it is so inconvenient to disturb the guardians' accounts that the Court will not order it to be repaid. This seems to be a clear decision that no money ought to be ordered to be repaid which was paid before October, 1916.

The result is that the Court of quarter sessions ought not to have ordered the repayment of the 484*l.* But the practical result of our judgment is that they ought to have ordered the repayment of part of that amount. At present all we do is to make the rule absolute for a writ of certiorari to bring up this order of the Court of quarter sessions with a view to its being quashed. At present we make no order for the quashing of the order of the Court of quarter sessions. When the proper application is made, unless the parties see fit in the meantime to agree to this alteration of the order, we shall have to consider what order should be made upon the application to quash. All that is done at present is to make the rule absolute to bring it up.

SANKEY J., after stating the facts, proceeded as follows:—The point now taken is that the notice of appeal to quarter sessions dated March 5, 1917, was out of time. Whether it was out of time or not depends on the construction of s. 22 of the County Rates Act, 1852, which allows an appeal on certain grounds and specifies the time within which the appeal is to be brought. There is a right of appeal to "the next quarter sessions of the peace after such cause of appeal shall have arisen." The question is, when did the cause of appeal arise? Mr. Macmorran contended that it arose on April 27, 1916, when the rate was made, and that therefore an appeal to quarter sessions in March, 1917, was out of time, because those were not "the next quarter sessions" after the cause of appeal arose. On the other hand, Mr. Ryde contended that the cause of appeal arose in February, 1917; whether on February 17, when the decision of the assessment committee reduced the rateable value, or on February 24, when the parish

(1) [1912] 2 K. B. 603.

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council received notice that the assessment of the parish had been reduced, does not matter, because the notice of appeal was given on March 5 and the appeal was heard on March 29. As to the meaning of the words "cause of appeal" Mr. Macmorran quoted the words of Blackburn J., who in giving judgment in *Reg.* v. *Barnet Sanitary Authority* (1), a case decided on the Public Health Act, 1875, said: "Sect. 269 of the Act states three subjects of appeal, first, a rate, which may very well be made behind the back of the person rated, and therefore the appeal is so many days after demand of the rate. Secondly, there is an appeal from any order, conviction, or detemination of any Court of summary procedure. Where the appeal is against a rate, the 'cause of appeal' would prima facie be upon notice of the rate, but where the appeal is from any order or conviction, one would certainly, prima facie, say that as soon as the order is made the party has a right to appeal, and is not bound to wait until the order is served." In my opinion the words "prima facie" show that Blackburn J. was not laying down any general rule. And, moreover, the interpretation of the words "cause of appeal" used in the Public Health Act, 1875, is of little help in interpreting those words in the County Rates Act, 1852. Reliance was next placed upon *West Riding of Yorkshire County Council* v. *Middleton Parish Council.* (2) There are words in the judgment of Ridley J. in that case which give considerable force to Mr. Macmorran's contention; but those words were not necessary for the decision of the case. A parish council had given notice on April 17, 1905, of appeal to the next quarter sessions which were held in June. All that it was necessary to decide, and all that was decided, was that the quarter sessions in June were not the next quarter sessions after the cause of appeal in that case had arisen. It is true that the learned judge went on to consider what would have been the next quarter sessions after the cause of appeal had arisen; but that was not necessary to the decision of the case. It was only necessary to decide whether the quarter sessions in June were too late. Neither of these authorities being in point, I turn to the words of the statute. One of the grounds of appeal is on account of the altered state of the value of the property assessed or any part thereof. Mr. Macmorran argued

(1) 1 Q. B. D. 558, 561. (2) [1906] 2 K. B. 157.

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that the alteration in the value took place when the rate was made, as far back as April 27, 1916; but I think a far more equitable result is produced without doing any violence to the section if the words "altered state of the value of the property assessed" are read as referring to the alteration made by the assessment committee on February 17, 1917. I think the appeal was in time. On the other points I do not desire to add anything to what my learned brothers have said.

Rule absolute for a certiorari.

Solicitors for parish council: *Whitfield, Burn & Dean, for M. E. Nee, Carnarvon.*

Solicitors for county council: *Huntley & Son, for J. Jones Morris, Carnarvon.*

W. H. G.

MONRO *v.* LORD BURGHCLERE.

1917
Dec. 6.

Landlord and Tenant—Covenant by Tenant to pay Expenses of Works required by future Statute—Provision of Fire Escape—Apportionment of Expense—"Just and equitable in the circumstances of the case"—London Building Acts (Amendment) Act, 1905 (5 *Edw.* 7, *c. ccix.*), *s.* 20.

In May, 1903, the respondent let a house in London to the appellant for twenty-one years, the lessee covenanting that he would "execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already passed or hereafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said premises whether by the landlord or the tenant thereof." At that date there had been passed the Factory and Workshop Act, 1891, which enacted that owners of factories should provide means of escape in case of fire. Two years after the date of the lease the London Building Acts (Amendment) Act, 1905, was passed, by which the owner of a house such as that demised by the respondent was required to furnish means of escape from fire, and by s. 20 of which it was provided that the owner on satisfying that requirement might apply to the county court judge of the district to apportion the expenses of the work between him and the lessee, and that the Court might "make such order concerning such expenses or their apportionment . . . . as appears to the Court to be just and equitable in the circumstances of the case regard being had to

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the terms of any lease or contract affecting such building." In 1915 the house was burnt down, and the London County Council under the Act of 1905 required the appellant, as being the owner of the house for the purposes of the Act, to provide sufficient means of escape from fire. He complied with the requirement, and applied to the county court judge to apportion the expenses as between him and his lessor. The county court judge held that the lessee must bear the whole burden of the expense. On appeal:—

Held, that, having regard to the language of the covenant and the fact that there was at its date a statute in force which imposed an obligation upon the owners of another class of buildings to provide means of escape from fire, the lessee must be presumed to have contemplated the possibility of an Act being thereafter passed imposing a similar obligation upon the owners of houses such as that which he was about to rent, and that under those circumstances no other order than that made by the county court judge would have been "just and equitable" within the meaning of s. 20.

APPEAL from the Westminster County Court.

By an indenture of lease dated May 21, 1903, Lord Burghclere, being the freeholder of No. 42, Albemarle Street, demised the said premises to William Brooks for twenty-one years from Lady Day, 1904, at a rent of 375*l.* per annum. The lessee thereby covenanted that he would "from time to time and at all times during the said term pay and discharge all rates taxes charges assessments and outgoings whatsoever whether parliamentary parochial or local or of any other description which are now or may at any time hereafter be assessed charged or imposed on the said premises or any erections or additions thereto," and also that he would "execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already passed or hereafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said demised premises whether by the landlord or the tenant thereof."

In November, 1903, William Brooks died. By an indenture of underlease dated October 31, 1905, his executors, of whom the plaintiff G. E. Monro is the survivor, demised the ground floor and basement of the said house to R. R. Davis for the residue of their term less three days at a yearly rent of 285*l.* Davis' underlease was subsequently assigned to W. E. Cobb. By a further indenture of underlease dated June 3, 1909, the said executors of William Brooks

demised the upper floors of the said house to the said W. E. Cobb for the residue of their term less one day at a yearly rent of 295*l*. In both the said last-mentioned indentures the underlessees covenanted that they would pay all "impositions and outgoings" at any time thereafter charged or imposed "on the premises hereby demised or upon the owner or occupier in respect thereof." In 1915 the house was burnt down for more than one half of its cubical extent. By the London Building Acts (Amendment) Act, 1905, s. 7, "Every new building . . . . which is constructed or adapted to be occupied by more than twenty persons . . . . shall be provided in accordance with plans approved by the Council . . . . with all such means of escape therefrom in case of fire as can be reasonably required under the circumstances of the case"; and by s. 6 any house which is "burnt or destroyed for more than one half of its cubical extent" is on re-erection to be treated as a "new building." The plaintiff Monro, who was then sole surviving executor of the lessee, and who as being in receipt of the said rent was the "owner" of the premises for the purposes of the said Act, proposed to rebuild the house in such a manner that it would be adapted to be occupied by more than twenty persons, and the County Council as a condition of permission to do so required him to erect means of escape from fire. He complied with that requirement at an expense of 410*l*. He then applied to the Westminster County Court under s. 20 of the said Act (1) to have the said expense apportioned between the several parties interested in the premises, Lord Burghclere the freeholder, himself the lessee, and Cobb the underlessee. The

(1) By s. 20 of the London Building Acts (Amendment) Act, 1905, "The owner of any building who has paid or incurred the expenses of executing any work in respect of such building which the owner of such building is required to execute under any provisions of this Act . . . . may if he thinks fit apply to the county court of the district in which such building is situate, and such court may thereupon issue a summons requiring the several persons entitled to any estate or interest in the building to appear before the court, and the court may make such order concerning such expenses or their apportionment among all the several persons entitled to any estate or interest in the building as appears to the court to be just and equitable in the circumstances of the case regard being had to the terms of any lease or contract affecting such building."

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deputy county court judge held, as between Monro and Cobb, that as the covenants in the underleases related only to outgoings charged on the portions of the house thereby respectively demised, and not upon the whole house, they did not cover this particular expense, and that, in the absence of any contract by Cobb to bear any part of it, it was reasonable to apportion to him only 160*l.* of the expense. With regard to the balance of 250*l.* he thought that, having regard to the plain language of the lessee's covenant in the second lease that he would execute all works which under any future Act of Parliament he might be required to execute, it would not be just or equitable to throw on the freeholder any part of the burden which had been clearly assumed by the lessee, and he apportioned the whole 250*l.* to the lessee. Monro appealed.

Moresby, for the appellant. The county court judge founded his decision on the lessee's covenant alone. He omitted to give any weight to the words "in the circumstances of the case." The section intended the covenant to be one of the factors, and not the sole factor, in the determination of what is just and equitable. There is no decision upon this section of the London Building Act, but there are decisions upon corresponding sections in the Factory Acts. In the Factory Act, 1891 (54 & 55 Vict. c. 75), there was a similar provision for requiring means of escape from fire, and by s. 7, upon an application by the owner for apportionment of the expenses the county court judge "may make such order as appears to the Court just and equitable under all the circumstances of the case." In *Monk* v. *Arnold* (1), where there was a covenant by the tenant in the same form as in the present case to pay all "outgoings," the Court held that the county court judge was entitled, notwithstanding the covenant, to apportion only a part of the expenses to the tenant. Lord Alverstone there said: "If the Legislature had intended that only questions arising out of the covenant between the landlord and the tenant should be discussed, it would have used different language." Channell J. said that if the liability to bear the burden would only fall on the tenant "by reason of some general expression in the covenant, sufficient possibly to include such expenses as these . . . . but not clearly

(1) [1902] 1 K. B. 761, 765, 767.

shewing that the parties had really contemplated the case," the county court judge might make such order as he thought just and equitable. In *Horner* v. *Franklin* (1), a case decided on the same Act and on the terms of a similar covenant, Romer L.J. said: "In my opinion the Legislature did not intend that the terms of the tenancy alone should determine this question." It is to be observed that in that Act the section, in specifying what the county court judge is to have regard to, says nothing about the contract between the parties, an omission which was supplied by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), upon which *Stuckey* v. *Hooke* (2) was decided; but nothing turns upon that distinction, the meaning of the two Acts being the same. In this last case, in which *Horner* v. *Franklin* (1) was followed, Fletcher Moulton L.J. said: "It is provided that, in arriving at that decision, regard shall be had to the terms of any existing contract between the parties, as part of the circumstances of the case, but, as it appears to me, only as such." But if the covenant is only part of "the circumstances of the case" to which the county court judge is to have regard, it would be unjust here to attach no weight to the fact that the present lessee has no beneficial interest in the premises, whereas the lessor would in seven and a half years' time become entitled to the whole benefit of the expenditure to which the lessee had been put.

Macmorran, K.C., and *Micklethwaite*, for the respondent. The county court judge rightly exercised his discretion. He did not fail to have regard to the facts upon which the appellant relies, but thought that they were altogether outweighed by the clear language of the covenant. The dictum of Channell J. in *Monk* v. *Arnold* (3) is in the respondent's favour, for it clearly showed that the parties had really contemplated the case. They must be taken to have known the provisions of the Factory Acts and of the decisions under those Acts, and to have contemplated that a similar burden might be imposed in the case of buildings other than factories. Moreover, there was nothing except the erection of means of escape from fire to which the "works covenant" in the appellant's lease could apply, for all the ordinary expenses imposed by a local authority, such as those of paving a street, or abating a nuisance, were already covered

(1) [1905] 1 K. B. 479, 488. (2) [1906] 2 K. B. 20, 25.
(3) [1902] 1 K. B. 761.

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by the covenant to pay all "impositions and outgoings." There is no hardship upon the appellant in this case, for, assuming that he contemplated such a possible burden, he got good consideration for taking the risk of its imposition in the fact that he got the lease at a lower rent than he would otherwise have been required to pay.

Moresby in reply.

LAWRENCE J. This is an appeal from the deputy judge of the Westminster County Court on a question arising under s. 20 of the London Building Acts (Amendment) Act, 1905. The question is as to the propriety of the apportionment of the expenses of a fire escape which the County Council required the appellant to erect as a condition of his being allowed to rebuild a house which had been partially destroyed by fire in the year 1915. The respondent, Lord Burghclere, was the freeholder of the house in question, and the appellant was the lessee under a lease for twenty-one years granted by Lord Burghclere in 1903. The appellant had sub-let the premises, and from 1909 onwards they were in the occupation of one Cobb as sub-lessee. It was not disputed that the County Council were entitled under ss. 6 and 7 of the Act of 1905 to require the appellant to erect the fire escape. The expense of erecting it amounted to 410*l.* Application having been made to the county court to apportion that expense between the freeholder, the lessee, and the sub-lessee, the deputy county court judge apportioned 250*l.* to the appellant, 160*l.* to Cobb the sub-lessee, and nothing to Lord Burghclere. No objection was taken to the amount apportioned to Cobb, and the appeal was confined to the apportionment as between the appellant and Lord Burghclere. The question is whether the deputy judge was wrong in point of law in making the apportionment which he did. The section of the Act which deals with the apportionment of expenses borne by owners (s. 20) says that where the owner of a building has incurred the expense of executing work which he was required by any of the provisions of the Act to execute he may apply for an apportionment of the expense between the several persons interested in the premises, and the Court may make such order "as appears to the Court to be just and equitable in the circumstances of the case regard being had to the terms of any lease or contract affecting such building." Mr. Moresby does not dispute

that the deputy judge was entitled to have regard to the terms of the appellant's covenant, but contends that he was bound to have regard to the other circumstances of the case also, that is to say, the time the lease had to run, and the fact that the appellant would derive no benefit whatever from the execution of the work, and that he disregarded those other circumstances entirely. I do not think that that is so. I think he did have regard to them. He states that all the facts relied on were present to his mind, but that he thought that the plain language of the covenant outweighed every other consideration. [He read the covenant.] The language of that covenant contemplates the possible imposition by some future Act of Parliament of a burden upon the tenant. But it is said that it does not necessarily contemplate such a burden as this. It must, however, be borne in mind that a few years before a similar burden had been imposed in the case of factories. Under those circumstances I think that the appellant when entering into this covenant must be taken to have contemplated that the burden of providing means of escape from fire might be extended to other classes of buildings, including such a building as that which he was about to rent. That being so, I think the deputy judge was right in leaving the appellant to bear the expense unless the words "just and equitable" oblige him to disregard the covenant upon the ground of the hardship involved to the tenant. But I think they do not. In *Monk* v. *Arnold* (1) Channell J. said: "If the parties had by express terms provided for expenses under this section of the Factory Act, so that, by that contract the liability for those expenses fell clearly on either the landlord or the tenant, then I do not think it would be just or equitable for the county court judge to make any other order"; and added that it was only where it was doubtful whether "the parties had really contemplated the case and intended that one or other of them should bear these expenses" that it was open to the county court judge "to make such order as might seem to him just and equitable in all the circumstances of the case." That language is in my opinion directly in point, for I think that the imposition of this particular burden was just as clearly contemplated as if it had been provided for by express terms in the covenant. The appeal must be dismissed.

(1) [1902] 1 K. B. 761, 767.

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SHEARMAN J. I am of the same opinion. The terms of s. 20 of the London Building Acts (Amendment) Act, 1905, refer the question of the apportionment of expenses borne by owners of buildings to the county court as a special tribunal, and directs the Court to make such order as appears to it to be "just and equitable in the circumstances of the case," and adds "regard being had to the terms of any lease or contract affecting such building." Those latter words, however, do not in any way qualify the provision that the order shall be such as appears to be just and equitable. The cases of *Horner* v. *Franklin* (1) and *Stuckey* v. *Hooke* (2) show that, whether the Act of Parliament under which the question arises contains those latter words or not, the same interpretation is to be put upon the words "just and equitable," and that those words confer a power upon the Court to disregard the contract between the parties if under the circumstances of the case it would be hard and unreasonable to adhere to the strict terms of the contract. The word "equitable" implies a power to relieve against hardship. Here the deputy judge had before him all the circumstances of the case and took them into consideration. He looked at the leases and sub-leases, their terms, and the dates when they were made; and he called attention to the fact that the imposition of a burden of this kind was well known at the time when the covenant was entered into in 1903. Having regard to those facts he came to the conclusion that the tenant had undertaken to bear the burden, and in those circumstances he held that he ought to follow the dictum of Channell J. in *Monk* v. *Arnold* (3) to the effect that where the parties clearly contemplated that the expense should fall upon the tenant it would not be just or equitable to relieve him of his bargain. He quite recognized that there might be old leases containing covenants in wide general terms which would be sufficient to cover such an imposition as this but which at the same time did not clearly show that the parties contemplated an imposition of this particular kind, and that in that case it might be just and equitable to disregard the terms of the covenant. But that is not this case. Here he finds that the parties did contemplate the possible imposition of this particular expense. The deputy judge therefore having taken into

(1) [1905] 1 K. B. 479. (2) [1906] 2 K. B. 20.
(3) [1902] 1 K. B. 761, 767.

consideration all the circumstances of the case including the terms of the contract, and having decided that it was just and equitable to leave the tenant to bear the expense, we cannot interfere with his decision.

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Appeal dismissed.

Solicitors for appellant: *Peake, Bird & Collins.*
Solicitor for respondent: *W. H. Oliver.*

J. F. C.

BRITISH ACTORS FILM COMPANY, LIMITED, AND OTHERS *v.* GLOVER.

1917
Dec. 8, 13.

[1917 B. 2613.]

Copyright—Partial Assignment—Licence—Dramatic and Musical Work—Right of professional Performance in Provinces—Cinematograph Display with Music—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 5, *sub-ss.* 2, 3.

By s. 1, sub-s. 2, of the Copyright Act, 1911, copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform the work or any substantial part thereof in public; and shall include the sole right, in case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorize any such acts as aforesaid.

By s. 5, sub-s. 2, the owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence. By sub-s. 3, where under any partial assignment of copyright the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated as the owner of the copyright.

By an agreement in writing for the consideration and upon the terms and conditions therein mentioned the owners of the copyright in a dramatic and musical work agreed to let to the defendant the right of professionally performing the work in the provinces of the United Kingdom, reserving to themselves full liberty to permit amateur performances. While this agreement was in force the same owners, in consideration of certain payments and royalties, granted to the plaintiffs a licence for five years to produce the work in moving picture films and to lease the films for exhibition in the

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United Kingdom and elsewhere, and agreed that the plaintiffs should have the right while showing the films to render instrumentally, but not vocally, any portions of the music of the work.

The plaintiffs produced a film of the work and had made arrangements for exhibiting the film with the orchestral music of the work, when the defendant published an announcement in various periodical papers stating that the entire provincial rights in the work and in the music in connection with any stage performance or moving picture display, other than amateur performances, were vested in him, and that proceedings would be taken against any proprietor of a theatre or picture palace infringing the defendant's agreement.

The plaintiffs claimed a declaration that they were entitled to the exclusive right of producing the work by cinematograph in the United Kingdom and of performing the music instrumentally in connection with the display of any film. The Court having ordered a speedy trial of the question of title between the plaintiffs and the defendant:—

Held, that there had been a partial assignment of the copyright to the defendant, and that he had become the owner of the particular right mentioned in his agreement and was entitled to take steps to prevent any infringement of that right by the plaintiffs in performing the music of the work.

TRIAL under Order L., r. 1 (*a*), of the Rules of the Supreme Court, 1883, before Lush J. without a jury. The question was as to the plaintiffs' right to produce instrumentally the music of a dramatic and musical work known as "Les Cloches de Corneville" in connection with a cinematograph display of the work.

Joseph Williams, Limited, were the owners of the copyright in the work, which was a comic opera.

By an agreement in writing dated April 30, 1917, and made between W. Muskerry Tilson (as agent for and on behalf of Messrs. Joseph Williams, Limited) of the one part and James M. Glover, the defendant, of the other part, it was agreed as follows: "The said Joseph Williams, Limited, agree to let and the said James M. Glover agrees to hire the right of performing the comic opera 'Les Cloches de Corneville' in the provinces of the United Kingdom on the following terms and conditions:—

"1. The said James M. Glover undertakes to put up and produce the said opera for at least two weeks certain during the months of June and July, 1917, and to pay 10*l.* 10*s.* for each week of such agreed initial performances.

"2. The said James M. Glover to pay down 25*l.* on signing this agreement for the option of booking a provincial tour of the said opera, the provincial rights of the said opera being reserved for him until September 1, 1917, on or before which date he shall give notice in writing should he elect to exercise such option in which case the 25*l.* so paid by him shall be credited to him in payment of the first fees payable in respect of such tour which shall be 8*l.* 8*s.* for each and every week of such tour and shall be paid to the said W. Muskerry Tilson not later than the week following each week's performance the said tour to commence not later than January 1, 1918.

"3. The said James M. Glover hereby guarantees a minimum twenty weeks' performance in each and every year during the continuance of this agreement but which shall nevertheless be determinable at the end of the first year by either party by giving to the other six months' previous notice in writing at the expiration of any half-year dating from the commencement of the first tour in which case a guarantee of ten weeks' performance only shall be payable for any odd half-year."

Clauses 4 and 5 related to payments to be made by the defendant on delivery of orchestral parts, prompter's copy, score, and libretto.

Clause 6 was as follows: "It is lastly agreed and declared that this agreement extends only to the provincial professional performances of the said opera and the said Joseph Williams, Limited, reserve to themselves full liberty to permit amateur performances."

On August 30, 1917, the defendant exercised the option referred to in clause 2 of this agreement, and, claiming that he had thereby become entitled to the entire provincial rights of the opera, he had since been engaged in arranging a tour and making engagements to produce it.

On June 2, 1917, an agreement in writing was entered into between W. Muskerry Tilson as agent for and on behalf of Joseph Williams, Limited (thereinafter called the licensors), of the one part and Gerald Malvern for and on behalf of the British Actors Film Company, Limited, the plaintiffs (thereinafter called the licensees), of the other part. It recited that the licensors were the sole proprietors in the United Kingdom and Colonies of the performing right and

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all other rights existing in the comic opera "Les Cloches de Corneville," and contained the following clauses :—

"1. The said licensors hereby grant to the said licensees a licence to produce the said work in moving picture films and to lease the said films for exhibition in the United Kingdom of Great Britain and Ireland its Colonies and Dependencies and the said licensors guarantee that in so far as any exclusive right in respect of moving picture films has vested or may hereafter vest in them as proprietors of the said work they have not assigned such right nor granted any licence in respect thereof to any other person or firm and that they will not do so during the currency of this agreement. This licence shall not be determinable for a period of five years from the release date of the films for exhibition except under the provision of clause 6 hereof and after such period it shall be determinable by six months' notice in writing given by the said licensors to the said licensees."

"4. The said licensees shall be at liberty should they wish to do so to transfer the benefits of this agreement to any first class and responsible firm of film manufacturers to be approved by the said licensors such approval not to be unreasonably withheld.

"5. The said licensors hereby authorize and empower the said licensees to institute and prosecute such proceedings as the said licensees may deem expedient to protect the rights hereby conferred and for the recovery of damages and penalties for the infringement of such rights and to secure to the said licensees the full benefit of this licence and for any of such purposes to use the name of the said licensors their executors administrators or assigns, the said licensees indemnifying the said licensors from all costs and expenses occasioned by such proceedings and the said licensors shall in any such proceedings at the expense of the said licensees afford to the said licensees all proper and reasonable assistance in proving and defending their title to grant the rights hereby conferred."

Clause 6 provided for the termination of the licence by notice in case the licensees failed to fulfil any of its conditions.

"7. The said licensees shall produce and release or cause or permit to be produced or released for exhibition or cause to be exhibited the said moving picture films within twelve months from the date of this agreement unless prevented by Government restrictions or

necessities of war in which event but not otherwise the said licensees shall be entitled to postpone the said release for six further months after peace has been signed.

"8. The said licensees shall pay to the said licensors a royalty of 10 per cent. as and when received of the gross amount for which they may lease or sell the said films."

Clauses 9 and 11 of the agreement related to the keeping and rendering of accounts by the licensees. Clause 10 provided for the payment of 100*l.* in advance on account of royalties. By clause 12 W. Muskerry Tilson was appointed by the licensors as their agent to receive payments due to them under the agreement. At the foot of the agreement this clause was added :—

"It is further agreed by the said parties hereto that the licensees and their assigns shall during the continuance of this agreement have the right to use any portions of the music of the said opera while showing the films but such music to be rendered instrumentally and not vocally."

The agreement contained a receipt for 100*l.* by the licensors under clause 10.

Early in the year 1917 the plaintiffs entered into an agreement with the International Exclusives, Limited, under which the plaintiffs agreed to produce cinematograph films exclusively for that company upon the terms that the two companies should share in the profits and expense of displaying the films, the International Exclusives, Limited, having the sole right of distributing the films produced. Under this agreement the plaintiffs produced a film of the opera at a cost of over 2000*l.* and had received from the International Exclusives, Limited, towards the cost of production upwards of £1400*l.*, and had made arrangements for the exhibition of the film with the orchestral music of the opera in the provinces.

In the issues of the following periodicals, namely, the *Era*, the *Stage*, the *Kinematograph Weekly*, the *Bioscope*, and the *Cinema*, which appeared during the week ending November 24, 1917, the defendant published an announcement in these words :

"'Les Cloches de Corneville.' Warning. The entire provincial rights of the above opera and any performance of the music in connection with any stage performance moving picture display or any stage picture other than amateur performances are vested in

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James M. Glover of 19 Sackville Street W. 2, and an injunction and action for damage will be immediately taken against any proprietor of theatre picture palace or concert hall who infringes the holder's agreement dated September 1, 1917 " (*sic*).

The plaintiffs alleged that they had suffered serious loss through the action of the defendant. On November 26, 1917, they issued the writ in this action claiming a declaration that under the agreement of June 2, 1917, they were entitled to the exclusive right to produce the opera by cinematograph in the United Kingdom and also to use the music instrumentally of the opera in connection with the display of any film, and claiming an injunction to restrain the defendant from making any announcements similar to those which had appeared in the periodicals mentioned above. On November 27 an interim injunction was granted restraining the defendant, his agents and servants, from claiming or in any way announcing that the entire provincial rights in the opera " Les Cloches de Corneville " and the rights of all performances of the music of the said opera in connection with any moving picture display were vested in the defendant, and that the plaintiffs had no right or title in the same or the performance thereof. On December 5, 1917, on the hearing of a summons to continue the injunction, a speedy trial under Order L., r. 1 (*a*), of the Rules of the Supreme Court, 1883, was ordered of the question of title between the plaintiffs and the defendant.

Patrick Hastings, for the plaintiffs. By s. 1, sub-s. 2, of the Copyright Act, 1911 (1), the owner of the copyright in a dramatic or

(1) Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), s. 1, sub-s. 2: " For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right,—

. . . . .

" (*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered,

and to authorise any such acts as aforesaid."

Sect. 5, sub-s. 2: " The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United

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musical work has the right to perform the work, to make a cinematograph film by means of which it may be mechanically performed or delivered, and to authorize the making of such a film. By s. 5, sub-s. 2, he is empowered to assign these rights. Joseph Williams, Limited, the owners of the copyright in this work, have by the agreement of June 2, 1917, assigned these rights to the plaintiffs, who are therefore entitled to make a film and perform the music of the work and to authorize these acts, unless the defendant by his agreement of April 30, 1917, acquired the exclusive right to perform the music in the provinces. He acquired no such right. Sect. 5, sub-s. 2, of the Act enables the owner of copyright (*a*) to assign the right wholly; (*b*) to assign the right partially; (*c*) to grant an interest in the right by licence. The defendant does not contend that he is an assignee of the right wholly. He cannot contend that he is an assignee partially, because, if he were, he would by s. 5, sub-s. 3, have the right to make films of the work; which cannot have been intended, as the owners themselves purported to have that right when they assigned it to the plaintiffs. Furthermore, the same sub-section would give the defendant the right to assign his interest at his will and pleasure. A partial assignment within s. 5, sub-s. 2, means an assignment of the whole copyright for a limited time, or within a limited space, or both, but not an assignment of certain constituent interests in the right. It follows that the defendant only acquired an interest in the right by licence, in which case he has no right or title to interfere with the plaintiffs' performance.

Giveen, for the defendant. The copyright in the work has been

Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent: Provided," &c.

Sub-s. 3: "Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly."

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assigned "partially" to the defendant within the meaning of s. 5, sub-s. 2, of the Act by the agreement of April 30. By sub-s. 3 of that section he is under this partial assignment to be treated as the owner of the copyright as respects the right assigned. He does not shrink from claiming, if necessary, the right to make a cinematograph film of any professional performance in the provinces, because s. 1, sub-s. 2 (*d*), of the Act gives him this right: *Guyot* v. *Thomson* (1); *Ward, Lock & Co.* v. *Long* (2); Copinger's Law of Copyright, 5th ed. (1915), p. 131.

Hastings replied.

Dec. 13. LUSH J., after stating the facts and referring to the two agreements, proceeded as follows:—The question that I have to decide is whether the plaintiffs are lawfully entitled, notwithstanding the defendant's agreement, to exhibit the film pictures with the music, and whether they are entitled to be protected by injunction against interference on the part of the defendant with that right.

Mr. Hastings contended that the rights of the defendant must be determined according to the provisions of s. 5 of the Copyright Act, 1911, and that, having acquired under that section a licence to perform the opera,—a licence and nothing more—the defendant is not entitled to interfere with or complain of the plaintiffs' exhibition and performance. Mr. Hastings admitted that the defendant would be so entitled if the copyright had been either wholly or partially assigned to him; but his case was that there was no assignment either in whole or in part. It would therefore follow, according to his contention, that the defendant was only a licensee, and if so could not interfere with or complain of the exercise of their rights by the plaintiffs. Sect. 5 says this: [The learned judge then read s. 5, sub-ss. 2 and 3, and continued:]

Now, to see whether Mr. Hastings' argument is well founded, one must see what is meant by the expression he used (namely, "a licence") in this connection. A licence in the strict sense is, as I said during the argument, nothing but a permission which would carry with it immunity from proceedings to those who act upon the permission. It is really a dispensation, and nothing more than a

(1) [1894] 3 Ch. 388. (2) [1906] 2 Ch. 550.

dispensation. In the case of *Heap* v. *Hartley* (1) Cotton L.J., referring to the expression "licence" and what that term carried, said this: "That is pointedly put in the judgment of Lord Hatherley then Vice-Chancellor, in this way:"—the Lord Justice is referring to a case of *Newby* v. *Harrison* (2)—"'With regard to the word "license," there is some little ambiguity. It is, however, well defined in the case of *Muskett* v. *Hill* (3), and I prefer stating it in the language there cited by Tindal C.J. (4) to giving my own.' It is thus stated: 'A dispensation or license properly passes no interest, but only makes an action lawful which without it had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful; but a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants.'"

But even if all the defendant obtained was a licence in the strict sense, it is clear now, since the decision of the Court of Appeal in *Hurst* v. *Picture Theatres, Ld.* (5), that if value is given for it it is irrevocable; and as Buckley L.J. in his judgment in that case said (6): "If there be a licence with an agreement not to revoke the licence, that, if given for value, is an enforceable right." In truth s. 5 of the Copyright Act, 1911, does not, in my opinion, refer to a mere licence in the strict sense, that is, to a permission to do an act, and a dispensation if it is done. The law with regard to a licence in that sense is not peculiar to the law of copyright; the consequences of a mere dispensation are the same whatever the right may be which the person entitled to it permits another to exercise. Sect. 5 of the Copyright Act does not refer to that kind of licence; it classifies the rights of a person deriving title from the owner of a copyright into complete assignments, partial assignments, and grants of an interest, which means a proprietary interest in the particular right which is the subject-matter of the agreement, with

(1) (1889) 42 Ch. D. 461, 468.
(2) (1861) 1 J. & H. 393.
(3) (1839) 5 Bing. N. C. 694.
(4) From *Thomas* v. *Sorrell* (1674) Vaugh. 351.
(5) [1915] 1 K. B. 1.
(6) [1915] 1 K. B. 10.

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a licence to exercise it; and the first question that I have to decide, it being of course clear that the defendant did not obtain a complete assignment of all the owner's right, is which of the two latter rights he acquired under his agreement: was there a partial assignment, or was there a grant of an interest in the right, with a licence to exercise it? If the latter, I think that I shall further have to consider what the nature of the defendant's right is, whether he would only have a claim on the contract for damages against his licensors, or whether he could protect his interest by injunction or otherwise.

Now I have felt, and still feel, some doubt with regard to the question whether there was a partial assignment of copyright. Sect. 5 recognizes the right of a copyright owner to part with one of his many rights, and to part with it subject to restrictions as to time, place, and otherwise, so as to make the grantee of the limited right which he acquires the actual owner of that limited part of the copyright. I have come to the conclusion that there was a partial assignment to the defendant, and that he has become the owner of the particular right mentioned in his agreement for the specified term and within the specified localities. I do not think there is any objection in law to an owner of copyright assigning one of his rights subject to such restrictions as these.

Mr. Hastings contended that if this view were right the defendant could produce the cinematograph film under s. 1, sub-s. 2, which says: "For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work," and so on, "and shall include the sole right—. . . . (*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered." I do not think that that contention is right. The right of reproduction appears to me to have been given by that sub-section only to the assignee of the work, and not to an assignee of a particular performing right only.

In my opinion, therefore, the defendant acquired something more than the interest in the performing rights, and therefore is entitled to take steps to prevent the infringement of those rights. The case of *London Printing and Publishing Alliance* v. *Cox* (1), though no doubt not precisely in point, I think supports the view that I have

(1) [1891] 3 Ch. 291.

taken as to the agreement operating as an assignment, or at least as an equitable assignment. It is clear that the plaintiffs' performance would constitute an infringement; apart from the representation of the drama by means of living pictures they claim the right to perform in the provinces the very music the right of performing which has been purchased by the defendant. It is of this that the defendant chiefly complains. It is not necessary to say whether, if the music were omitted, the plaintiffs could produce the film pictures. The entire performance as proposed includes the music on which the plaintiffs insist.

In this view of the matter I need not consider what the defendant's position would be if he had only acquired the grant of an interest. It seems to me to be clear that he acquired the exclusive interest in the limited performing rights, and it may well be that he could protect by injunction, if the proper procedure is followed, the interest that he obtained, and would not be confined to his remedy in damages against his grantors; but, as I say, it is not necessary to decide this.

For the reasons I have stated, judgment must be for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiffs: *Amery, Parkes & Co.*
Solicitors for defendant: *Stanley, Woodhouse & Hedderwick.*

W. H. G.

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Dec. 10, 11.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* BISHOP, GRANTWAY, AND TRICHTER.

Criminal Law—Conspiracy—Liability to Military Service—Certificate of Exemption—Military Service Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 104)—*Military Service Act,* 1916 (*Session* 2) (6 *&* 7 *Geo.* 5, *c.* 15).

The prisoners were convicted of conspiring to defeat the provisions of the Military Service Acts, 1916, by enabling persons liable for military service to wholly or partially escape from that liability.

The material facts relied upon by the prosecution were that the prisoners conspired together to give one Bennett the sham appearance of heart disease by the administration to him of thyroid gland of sheep in order to deceive the military tribunal before whom he was to appear, and so to cause the tribunal to arrive at the opinion that he was unfit for active service.

At all material times Bennett held a certificate of exemption from the provisions of the Military Service Acts, 1916, granted by the Secretary of State, Home Office, being a Government department under s. 2, sub-s. 2, of the Military Service Act, 1916, the exemption being expressed in the certificate to be conditional on his continued employment in the Metropolitan Special Constabulary. The certificate was liable to be withdrawn at any moment under s. 3, sub-s. 1, of the Military Service Act, 1916 :—

Held, that the conviction must be upheld; inasmuch as a man is liable for military service under the Acts who is or may become liable for military service.

APPEAL by the prisoners Bishop and Grantway against their conviction.

The prisoners were tried at the Central Criminal Court, before Shearman J., on October 12, 1917, and following days, upon an indictment charging them (inter alia) with having on April 4, 1917, and on divers days between that day and May 7, 1917, conspired together and with other persons unknown to defeat the provisions of the Military Service Acts, 1916 (1), by enabling persons liable for military service to wholly or partially escape from that liability. The facts (so far as material to this report) were that the prosecution alleged that the prisoners conspired together to give one Bennett, a British subject between the ages of eighteen and forty-one, the

(1) See note on p. 314, post.

sham appearance of heart disease by the administration to him of thyroid gland of sheep in order to deceive the military tribunal before whom he was to appear, and so to cause the tribunal to arrive at the opinion that he was unfit for active service. It was not disputed that Bishop, who was a medical man, had administered thyroid gland to Bennett, but Bishop gave evidence to the effect that he administered it in proper doses for the purpose of removing obesity, from which Bennett was suffering.

At all material times Bennett held a certificate of exemption from the provisions of the Military Service Acts, 1916, granted by the Secretary of State, Home Office, being a Government department under s. 2, sub-s. 2, of the Military Service Act, 1916, the exemption being expressed in the certificate to be conditional on his continued employment in the Metropolitan Special Constabulary and being liable to be withdrawn at any moment under s. 3, sub-s. 1, of the Military Service Act, 1916. The ground upon which the exemption was granted was that it was expedient in the national interests that he should continue in the said employment.

The jury convicted the prisoners. Bishop and Grantway appealed, upon the ground (inter alia) that it was known that Bennett was a person not liable for military service under the Military Service Acts, 1916, and that there was in consequence no evidence in law to go to the jury of the existence of the alleged conspiracy.

Hawke, K.C., and *Huntley Jenkins*, for Bishop. There was no evidence of a conspiracy to defeat the provisions of the Military Service Acts, 1916. The question is whether a man temporarily exempted from military service is liable to military service upon the ground that if and when his exemption terminated he would become liable to service. The effect of the Military Service Acts, 1916, is that persons who hold certificates of exemption are while the certificates are in force to be in the same position as if the Acts had not passed. Therefore at the time of the alleged conspiracy Bennett was not liable to military service, and there can be no conspiracy to enable a person to escape from military service if he is not liable for service. A person cannot be liable for military service if at all material times he is exempted from military service. A person

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cannot be defeating the provisions of the Military Service Acts, 1916, if he does an act in order to prevent a man serving who is not liable to serve. A man is not liable to the provisions of the Acts who is by the Acts exempted from their provisions. Bennett was not liable to the provisions of the Acts, although at some future time he might become so. The only overt act proved against Bishop was the administration by him of the thyroid gland to Bennett. A general conspiracy cannot be established merely by proving one overt act. For example, a general conspiracy to steal boots wherever they could be found would not be proved by merely giving evidence of stealing boots from one shop. It would be evidence towards proving the general conspiracy, but would not amount to proof of it. "Liable for military service" means "presently liable." In the same way a person cannot be said to be liable for a debt which is not payable. [It was also contended that there had been misdirection by the learned judge in his summing up to the jury at the trial, but that portion of the argument does not call for a report.]

Lort-Williams, for Grantway. Even if a person could be said to be liable for a debt not yet payable, the present case is distinguishable, for in the case of a debt the future liability to pay is certain; but in the present case there is no certain future liability. There cannot be a conspiracy to do an act which may or may not defeat the provisions of a statute. There must be a certainty that Bennett would become liable to the provisions of the Military Service Acts, 1916, in order that the indictment may be supported. Bennett was not within the provisions of the Acts, and therefore all that was done to him was lawful.

R. D. Muir, *Travers Humphreys*, and *Percival Clarke*, for the Crown.

The judgment of the COURT (the Earl of Reading C.J., Lord Coleridge and Avory JJ.) was delivered by

THE EARL OF READING C.J., who, having stated the facts, continued: Upon those facts the first point taken upon behalf of the prisoners is one of law. We will deal with it first, inasmuch as it goes to the root of the matter. The argument is that no offence has been committed, inasmuch as Bennett was not liable to military

service under the Military Service Acts, 1916, and consequently that there could not have been a conspiracy to defeat the provisions of the Acts, as they had no operation so far as Bennett was concerned. The point turns upon whether it can be said that Bennett was a person liable for military service under these statutes. It is clear upon the facts proved, and indeed it cannot be disputed, that Bennett was a person who came within the Military Service Acts, 1916, but for the fact that he held a certificate of exemption. He was between the ages of eighteen and forty-one, a British subject, and, therefore, to use the words of the Military Service Act, 1916, "unless he . . . . is within the exceptions set out in the First Schedule to this Act, or has attained the age of forty-one years before the appointed date," he shall "be deemed . . . . to have been duly enlisted in his Majesty's regular forces for general service . . . . ." The argument is that he was a person within the exceptions set out in the First Schedule to the Act; and reliance is placed on the 6th exception, which it is said applied to Bennett as being a man who held "a certificate of exemption under this Act for the time being in force." Bennett held a certificate of exemption and, it was said, a certificate which was for the time being in force. It is true that that certificate had not been cancelled or withdrawn; but it is equally true that he was liable for service at any moment the Home Office, or the appropriate Government department, chose to withdraw or cancel it. It is true that the certificate held good until it was withdrawn or cancelled; but the point is that it was a certificate liable to be withdrawn or cancelled at any moment. Was he, then, a person liable for military service? That depends very much on the meaning to be given to the words in the provisions enabling a person liable for military service wholly or partially to escape from that liability. We can see no ground for holding that the words "liable for military service" must be construed as meaning persons who are liable at that moment for military service. We see no ground why they should not be construed as meaning a person who is or may be liable for military service. Having arrived at that conclusion, it is plain that as Bennett was a person who might be liable to military service at any moment the point of law has no substance, and the appeal on that ground must fail.

[His Lordship then dealt with the question of misdirection by the

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learned judge at the trial, and in the result said that the Court had come to the conclusion that the appeal on that ground must also fail.]

Appeal dismissed.

Solicitor for Crown : *Director of Public Prosecutions.*
Solicitors for Bishop : *Stikeman & Co.*
Solicitor for Grantway : *W. H. Cowl.*

NOTE.—Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15), s. 1, sub-s. 1 : " Every male British subject who has at any time since the fourteenth day of August nineteen hundred and fifteen been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in his Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve."

Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 2, sub-s. 2 : " Certificates of exemption from the provisions of this Act may also be granted by any Government Department . . . . to men or classes or bodies of men who are employed or engaged or qualified for employment or engagement in any work which is certified by the Department to be work of national importance and whose exemption comes within the sphere of the Department."

Sub-s. 5 : " Any Government Department may direct that any certificates granted by or on behalf of that Department before the appointed date as to employment on work for war purposes may be treated as certificates of exemption for the purposes of this Act."

Sect. 3, sub-s. 1 : " A certificate of exemption may be reviewed or renewed at any time by the . . . . Government Department . . . . and may be withdrawn or varied if the authority by whom the certificate is reviewed are of opinion that, in the circumstances of the case, the certificate should be withdrawn or varied."

Par. 6 of the exceptions contained in the First Schedule to the Act includes " Men who hold a certificate of exemption under this Act for the time being in force."

J. E. A.

In re An Arbitration between RUBEL BRONZE AND METAL COMPANY, LIMITED, and VOS.

1917
Dec. 20, 21.

Master and Servant—Wrongful Dismissal—Repudiation of Contract—Damages.

The right to bring an action for "wrongful dismissal" is a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract.

In November, 1915, by an agreement in writing, the defendants, a company carrying on an establishment controlled under the Munitions of War Act, 1915, appointed the plaintiff general manager of its works for three years at a fixed salary and a commission upon the net profits of the business available for dividend upon a rising scale, and if the net profits for the second and third year together amounted to a certain sum the agreement was to be continued for a further period of three years upon the same terms and conditions. In January, 1917, the defendants purported to "suspend" the plaintiff from the exercise of his duties pending an investigation as to his efficiency; they also compelled him to deliver up the badge he held as a person engaged in munition work at a controlled establishment on the ground that he was no longer "indispensable," and they appointed another person to take charge of the works instead of the plaintiff, and on the following day they took from him his business keys and informed him that he must not return to the works as he was not wanted, and required him to deliver up all cash belonging to them. As a result of these acts the plaintiff elected to treat the contract as repudiated by the defendants and claimed damages for wrongful dismissal:—

Held, that the defendants had wrongfully repudiated their contract, and the plaintiff was therefore entitled to damages, inasmuch as the defendants absolutely forbade him to fulfil any of his duties, they prevented him from exerting his opportunities as a manager to gain commission upon the net profits of the company, and they decisively ended his attendance at the premises.

Turner v. *Sawdon & Co.* [1901] 2 K. B. 653 distinguished and doubted.

Award in the form of a special case stated by an umpire.

The following statement of the facts is taken from the judgment of the learned judge:—

"In this arbitration Sir Ernest Pollock, K.C. (the duly appointed umpire), has stated his award in the form of a special case. Mr.

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Vos claimed against the Rubel Company for breach of a service agreement. The umpire awarded him the sum of 650*l.* damages. In this judgment I shall refer to Mr. Vos as the plaintiff and to the Rubel Company as the defendants. Important points upon the law of wrongful dismissal arose, and hence I put my judgment into writing. The facts may be briefly stated.

" On November 10, 1915, the plaintiff entered into a written contract with the defendants whereby the defendants agreed to employ him as general manager of their Birmingham works. The following clauses of the agreement are material :—Clause 1 : ' The company agrees to appoint the manager as general manager of its temporary works, and of its intended permanent works at Birmingham or at such other place as it may hereafter establish.' Clause 2 : ' The duties shall be those usually appertaining to the post, and such other duties consistent therewith, as the board of directors may from time to time determine.' Clause 3 : ' The term of the appointment shall be three years from October 1, 1915, to be extended for a further period of three years as hereinafter provided.' Clause 4 : ' The remuneration of the manager shall be as follows :—(*a*) A fixed salary of 400*l.* per annum payable monthly, with a monthly allowance of 16*l.* 13*s.* 4*d.* for expenses. (*b*) A commission upon the net profits of the business available for dividend arising from all manufacture purchases and/or sales upon a rising scale as follows :— Upon the first 10,000*l.* or less, 2 per cent. ; between 10,000*l.* and 20,000*l.*, 4 per cent. ; between 20,000*l.* and 30,000*l.*, 8 per cent. upon any sum in excess of the first 30,000*l.*, 12 per cent. In the event of having to calculate for any less period than one year, then a proportionate part of the said year shall be taken so soon as the net profits for the completed year have been ascertained . . . .' Clause 5 : ' The manager shall devote his whole time and attention to the business of the company, shall be faithful and diligent and efficient in the discharge of his duties, shall keep true and accurate records in the books of the company of all transactions, and shall at all times carry out the instructions of the board of directors or of any person duly appointed by them.' Clause 7 : ' If the net profits under clause 4 have amounted for the two years commencing October 1, 1916, to a sum equal to 10 per cent. per annum upon the company's issued capital ranking for dividend during that period,

this agreement shall be continued for a further period of three years upon the same terms and conditions.'

" It is clear from clause 4 that the plaintiff might derive a very substantial part of his remuneration from commission on the net profits of the business. Those net profits might depend largely upon the knowledge, ability and energy of the plaintiff as general manager.

" The parties worked satisfactorily together until the end of 1916. Differences then arose. On January 1, 1917, the defendants did three things : (1.) They purported to ' suspend ' the plaintiff from the exercise of any of his duties pending an investigation as to his efficiency. (2.) They compelled the plaintiff (in spite of his protest) to deliver up the badge he held as a person engaged in munition work at a controlled establishment under the Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), and the Munitions (War Service Badges) Rules, 1915. The ground for such demand was that the plaintiff was no longer ' indispensable.' (3.) They appointed a Mr. Moore to take charge of the works instead of the plaintiff.

" On January 2, 1917, the defendants took from the plaintiff his business keys, and they informed him that he must not return to the works as he was not wanted. They also required him to deliver up all cash belonging to them. As a result of such acts the plaintiff elected to treat the contract of November, 1915, as repudiated by the defendants, and he claimed damages for wrongful dismissal.

" The defendants, however, refused to recognize such claim and denied that they had dismissed the plaintiff. About a week later the defendants required the plaintiff to appear before the board of directors ; but he declined to do so save on the terms that he should attend without prejudice to his claim that he had already been wrongly dismissed. Thereupon the defendants expressly dismissed the plaintiff from his employment by resolution of the directors duly passed on January 29, 1917."

The agreement contained a provision that any dispute under it was to be referred to arbitration. Before the arbitrators it was contended on behalf of the plaintiff that the defendants had wrongfully repudiated the contract and had wrongfully dismissed the plaintiff, and that he was entitled to damages.

On behalf of the defendants it was contended (1.) that on

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January 1 and 2 they had only suspended the plaintiff in accordance with powers reserved to them under the articles of association; and (2.) that the defendants were justified in dismissing the plaintiff on January 29, and that he was only entitled to a sum due under the agreement to that date.

The umpire held that, so far as it was a question of fact, (1.) the defendants by the acts stated on January 1 and 2, 1917, wrongfully repudiated the contract and wrongfully dismissed the plaintiff, and he awarded damages 650*l.*; (2.) if the plaintiff was not dismissed on January 2 and was not entitled to claim for wrongful dismissal he was not entitled to refuse to attend the board and was rightfully dismissed on January 29, and that the sum due to him down to that date was 45*l.* He awarded, subject to the opinion of the Court, that the company were liable to the plaintiff for breach of their agreement with him, and must pay him 650*l.* damages and must pay the costs of the arbitration.

The question for the opinion of the Court was whether on the facts stated above the defendants were liable to pay the plaintiff the 650*l.* If the Court should decide in the affirmative, the award was to stand; if in the negative, the award was to be for the sum of 45*l.* only, and each party was to bear their own costs of the reference and one half of the costs of the award.

Claughton Scott (*R. A. Wright, K.C.*, with him), for the defendants. The umpire was wrong in finding that the defendants had wrongfully dismissed the plaintiff. The suspension of a servant does not put an end to the contract between him and the company. On the contrary, it involves a continuance of the contract. There was no repudiation of the contract by the company, and therefore the plaintiff could not by purporting to accept the supposed repudiation put an end to the contract. To constitute a repudiation of the contract there must be a definite refusal to perform it: *Prickett* v. *Badger*. (1) The present case is distinguishable from one in which a servant earns a salary and commission. He was entitled to his salary and to a share of the profits of the company. The profits would be earned whether the plaintiff was suspended or not.

(1) (1856) 1 C. B. (N.S.) 296.

[*Turner* v. *Sawdon & Co.* (1), *Turner* v. *Goldsmith* (2), and *Hanley* v. *Pease* (3) were referred to.]

Sandlands, for the plaintiff. The umpire's findings of fact are binding. *Turner* v. *Sawdon & Co.* (1) is distinguishable. In that case there was no agreement, as in the present case, to pay commission and therefore to give the plaintiff continuous employment during the term of the contract. *Addis* v. *Gramophone Co.* (4) shows that the nature of the employment must be taken into consideration and covers the present case. In that case the Gramophone Company acted to their servant in the same manner as the defendants in the present case did to the plaintiff. In *Turner* v. *Sawdon & Co.* (1) there was no question of commission. The servant was merely a commercial traveller, and not, as in the present case, a works manager requiring technical knowledge. The plaintiff's munition badge was a symbol of his employment of which he was deprived. Upon the terms of the contract with the plaintiff there was an implied agreement to provide him with work during the first three years in order to ascertain whether the contract was to continue for a further term of three years. As the defendants had the power of discharging the plaintiff if he did not efficiently perform his duties there was an obligation upon them to give him the opportunity of performing them. The fact that the defendants had the power to dismiss the plaintiff and appointed a successor to him shows that they repudiated their contract with him. The facts as found by the umpire are capable in law of constituting a wrongful dismissal of the plaintiff, and the award ought therefore to be upheld.

Claughton Scott in reply. *Addis* v. *Gramophone Co.* (4) merely dealt with the question whether a servant can claim damages for the manner of his dismissal or for the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment. In the present case the plaintiff was entitled to his commission whether employed or not. It is very doubtful whether the plaintiff was entitled to wear the badge unless he was physically employed in the factory.

Cur. adv. vult.

(1) [1901] 2 K. B. 653.
(2) [1891] 1 Q. B. 544.
(3) [1915] 1 K. B. 698.
(4) [1909] A. C. 488.

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Dec. 21. The following judgment was read by

McCARDIE J., who, after stating the facts, continued: The umpire has found that the dismissal on January 29 was justified if (as contended by the defendants) the contract had not been repudiated by them in the first week in January. The finding of the umpire with respect to January 29 has not been challenged by the plaintiff. It is not open to me to review it. I therefore express no opinion upon it. Hence arises the important question as to whether or not the events of January 1 and 2 justified the plaintiff in treating the contract of November 15 as repudiated by the defendants and in claiming damages for such repudiation and/or for wrongful dismissal. Mr. Claughton Scott ably contended for the defendants that the events of January 1 and 2 amounted to a "suspension" only. He pointed out that the defendants never used the word "dismiss," nor did they purport to dismiss. They only (so ran the argument) relieved him of his functions as manager, but did not terminate the employment. The defendants contended throughout that no dismissal had taken place until January 29.

On the other hand Mr. Sandlands forcibly argued for the plaintiff that the events of January 1 and 2 obviously amounted to a repudiation of the defendants' contractual obligations and that they constituted a wrongful dismissal. Hence it is desirable to briefly consider the meaning of the words "wrongfully dismiss." The phrase has often been used, but never defined. Does it indicate a peculiar contractual feature of the relationship between master and servant, or does it denote a mere application to such relationship of the well-known principles of law as to the repudiation of contracts? The relation of master and servant differs in important respects from other contracts. The power of dismissal sprang into existence at a late stage of the development of the common law (see the useful note in Macdonell on Master and Servant, 2nd ed., pp. 191-192). It was practically unknown in the eighteenth century. It first took clear form in the year 1817, when Lord Ellenborough tried the case of *Spain* v. *Arnott*. (1) There the servant refused to obey his master's orders, and Lord Ellenborough held that the master was justified in terminating the employment.

(1) (1817) 2 Stark. 256.

In my view the ratio of that decision was that the servant had, in substance, refused to fulfil his essential obligations under the contract, whereby the master was entitled to treat the contract as ended. Thenceforward the law as to dismissal developed rapidly, though the principles are but rarely revealed and the jurist may seek in vain for the ordered rules of growth.

To-day it is well settled that a master may dismiss his servant for many reasons, such as misconduct, substantial negligence, dishonesty, and the like. Such matters may, I think, be said to constitute such a breach of duty by the servant as to preclude the further satisfactory continuance of the relationship and to justify the master in electing to treat the contract as repudiated by the servant. But the point is one of doubt, as the light of formulated ratio illuminates but few of the decisions. Perhaps the modern view has been that continued good conduct by the servant is a condition, either express or implied, of the contract of service the breach of which entitles the master to end the employment: see the doubt of Lush J. in *Hanley* v. *Pease*. (1) Such view is certainly consistent with the effect of the decisions in *Ridgway* v. *Hungerford Market Co.* (2), and *Baillie* v. *Kell*. (3) It is clear, however, that if a dismissal be without just cause the master is deemed to have wrongfully repudiated his contractual obligations to the servant: see *General Billposting Co.* v. *Atkinson*. (4) "Wrongful dismissal" is, I think, a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract. The doctrine of repudiation equally applies when the master wrongfully refuses, before the period of employment has arrived, to take the servant into his service: see *Hochster* v. *De la Tour*. (5)

Now in the ordinary case of wrongful dismissal a master purports completely to terminate the contract. He refuses to accept further service. He wholly declines to pay further remuneration. The repudiation, as a rule, is undoubted, decisive, and complete. But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case

(1) [1915] 1 K. B. 698, 705.
(2) (1835) 3 Ad. & E. 171.
(3) (1838) 4 Bing. N. C. 638.
(4) [1909] A. C. 118, 122.
(5) (1853) 2 E. & B. 678.

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of master and servant. Those rules were first clearly indicated in *Withers* v. *Reynolds*. (1) There a buyer had deliberately refused to perform the obligation of his contract as to payment at a particular time. It was held that thus he had wrongly repudiated his contract and that the seller was freed from the further performance of his agreement. In the leading case of *Mersey Steel Co.* v. *Naylor* (2) Lord Blackburn expressly approved of *Withers* v. *Reynolds*. (1) It has been authoritatively stated that the question to be asked in cases of alleged repudiation is " whether the acts and conduct of the party evince an intention no longer to be bound by the contract " : see per Lord Collins in *General Billposting Co.* v. *Atkinson*. (3) The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation : see the decision of the Court of Appeal in *Rhymney Ry. Co.* v. *Brecon Ry. Co.* (4); see also per Bowen L.J. in *Bottoms* v. *York Corporation* (5) and per Cotton L.J. in *Johnstone* v. *Milling*. (6) But, as already indicated by *Withers* v. *Reynolds* (1), a deliberate breach of a single provision of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain: see, e.g., per Bigham and Walton JJ. in *Millar's Karri and Jarrah Co.* v. *Weddel* (7), and per Kennedy J. in *Berk & Co.* v. *Day*. (8)

In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case. If the matters alleged to constitute a repudiation are contained in written documents, then it is for the Court to determine whether such

(1) (1831) 2 B. & Ad. 882.
(2) (1884) 9 App. Cas. 434, 442.
(3) [1909] A. C. 118, 122.
(4) (1900) 83 L. T. 111 ; 16 Times L. R. 517, 519.
(5) (1892) Reported in Hudson on Building Contracts, 4th ed., vol. 2, pp. 208, 226.
(6) (1886) 16 Q. B. D. 460, 471.
(7) (1908) 100 L. T. 128.
(8) (1897) 13 Times L. R. 475.

documents evince a determination not to be bound by the contract. But if such matters consist of acts or conduct, then it is for the jury as judges of fact to determine whether repudiation is established: see *George D. Emery Co.* v. *Wells.* (1)

In the present case there was, I think, evidence upon which the umpire could properly find that the defendants had wrongfully repudiated their contract with the plaintiff during the first week of January, 1917. He has so found as a fact. I support his finding inasmuch as the defendants absolutely forbade the plaintiff to fulfil any of his duties; they prevented him from exerting his opportunities as a manager to gain commission upon the net profits of the company, and they ignominiously and decisively ended his attendance at the premises. I further think that the umpire was warranted in finding that there had been a "wrongful dismissal." Dismissal may be effected by conduct as well as words. A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract of enployment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract. I see no distinction in such a case as the present between repudiation by the defendants of their contractual obligations and "a wrongful dismissal" in the ordinary sense of that phrase. It is said, however, by the defendants that the decision of the Court of Appeal in *Turner* v. *Sawdon & Co.* (2) precludes me from supporting the award of the umpire inasmuch as it is not found that the defendants were unwilling to continue the payment of the plaintiff's salary. If that decision applies here, I must loyally follow it, even though I may think that the views of the Court of Appeal admit of further discussion. In that case the plaintiff was engaged by the defendants as representative salesman for four years at a salary. Before the expiration of that period the defendants, though willing to pay wages to the plaintiff, refused to give him any work to do as their representative salesman. The jury expressly found that the

(1) [1906] A. C. 515, 524, 525. (2) [1901] 2 K. B. 653.

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defendants' conduct constituted a breach of their obligations, and they also found that it was such a substantial breach as to justify the plaintiff in treating it as a refusal on the part of the defendants to perform and abide by their contract. The judge at the trial (Kennedy J.) accordingly entered judgment for the plaintiff, but the Court of Appeal directed that judgment should be entered for the defendants on the ground that there was no obligation on the part of the defendants to find work for the plaintiff, and that so long as they paid the salary there was no breach of contract by them. I need not point out the serious results which might follow if *Turner* v. *Sawdon & Co.* (1) were to apply to all cases of employment. The judgment of Stirling L.J. recognizes that the decision of the Court of Appeal may not apply to certain occupations—e.g., to an actor or public singer. In many cases, moreover, a man may enter into the service of another for a long period and at a low wage for the direct purpose of gaining business experience or mechanical skill. It will suffice to say that in my view *Turner* v. *Sawdon & Co.* (1) does not apply to the present case. There the servant was paid by salary only. Here the plaintiff might become entitled to a large commission on the net profits (if made) of the company. He had therefore the right to ask that he should have a full opportunity of earning such commission. The defendants wholly deprived him of such opportunity. A vital distinction therefore exists between the facts here and the facts in *Turner* v. *Sawdon & Co.* (1) The facts in the present case would fall within *Turner* v. *Goldsmith* (2) rather than within *Emmens* v. *Elderton*. (3) The latter was moreover not a case of master and servant. Hence I think that the decision in *Turner* v. *Sawdon & Co.* (1) (if it be a binding authority) must be confined to cases where the facts are substantially identical with the facts there existing, where the Court can properly hold that no obligation exists on the employer, on the just construction of the contract, to find reasonable work for the servant, and where payment is by salary alone. I have distinguished *Turner* v. *Sawdon & Co.* (1), but I venture to think that it would be desirable, particularly in view of my succeeding observations, if it could be considered in the House of Lords. It may well

(1) [1901] 2 K. B. 653. (2) [1891] 1 Q. B. 544.
(3) (1853) 13 C. B. 495.

be forcibly argued that in *Turner* v. *Sawdon & Co.* (1) the defendants repudiated a substantial portion of their contractual obligations. The circumstances of the case now before me fall, in my view, within the opinions of the House of Lords in *Addis* v. *Gramophone Co.* (2) There the plaintiff was employed as the manager of the defendants' business at Calcutta at 15*l.* per week salary and a commission on the trade done. He could be dismissed by a six months' notice. In October, 1905, the defendants gave him six months' notice, whilst at the same time they took steps to prevent him from acting any longer as manager. They did not, however, intend to discontinue his salary. Thereupon the plaintiff relinquished his post, came to England, and sued for damages. The majority of the Law Lords regarded the conduct of the defendants as a repudiation of the contract, and therefore as constituting a wrongful dismissal. Upon such footing the plaintiff succeeded in recovering substantial damages, although it was held that vindictive or punitive damages could not be awarded in such a case. Hence my doubts are strengthened as to the present validity of the decision in *Turner* v. *Sawdon & Co.* (1), and hence an added reason also for not applying the latter decision to the facts of the present case. Unhappily *Turner* v. *Sawdon & Co.* (1), which had been decided eight years previously, was not cited in the arguments before the House in *Addis* v. *Gramophone Co.* (2) For the above reasons I affirm, with costs, the award of Sir Ernest Pollock in favour of the plaintiff.

Award affirmed.

Solicitor for plaintiff: *F. J. Berryman, for T. Haynes Duffell, Birmingham.*

Solicitors for defendants: *W. A. Crump & Son.*

(1) [1901] 2 K. B. 653. (2) [1909] A. C. 488.

J. E. A.

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Jan. 18, 21.

[IN THE COURT OF APPEAL.]

ERNEST LYON, LIMITED *v.* WILLIAM STURGES & CO.

[1917 E. 564.]

Practice—Statement of Claims—Default in Delivery within Time limited—Application to dismiss Action for want of Prosecution—Delivery before Hearing—Rules of Supreme Court, 1883, *Order* XXVII., *r.* 1.

By Order XXVII., r. 1, "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just."

Plaintiffs having made default in delivering a statement of claim within the time limited by an order of Court, the defendants issued a summons under the above rule to have the action dismissed for want of prosecution. Before the summons was heard the plaintiffs delivered a statement of claim:—

Held, that the latter part of the rule applied only where no statement of claim had been delivered before the hearing of the application to dismiss; that as a statement of claim had been delivered before the hearing, although out of time, it could not be treated as a nullity; and, therefore, that the Court had no jurisdiction to dismiss the action.

Decision of Lord Coleridge J. reversed.

APPEAL from Lord Coleridge J. in chambers.

On August 1, 1917, the plaintiffs issued a writ against the defendants claiming damages for negligence as solicitors, delivery up of a lease, and damages for detaining the same. On October 12 an order was made for the delivery by the plaintiffs of a statement of claim within a period expiring on November 2. This period was extended by an order by consent to November 9, by a peremptory order to November 16 and by a final peremptory order to November 22. No statement of claim was delivered by November 22. On November 23 the defendants issued a summons under Order XXVII., r. 1, to dismiss the action for want of prosecution, and

later in the same day the plaintiffs delivered a statement of claim in which they abandoned their claim for damages for negligence. On November 26 the summons was heard by Master Jelf, who made an order dismissing the action. On December 18, Lord Coleridge J. in chambers, on an appeal by the plaintiffs, affirmed the order made by the Master.

The plaintiffs appealed.

Herbert Jacobs (for *W. Craig Henderson*, serving with His Majesty's Forces), for the appellants. If a statement of claim is delivered at any time before the making of an order dismissing the action for want of prosecution there is no jurisdiction to make such an order. Order XXVII., r. 1, says, in terms, "if no statement of claim shall have been delivered." The Court can only order the plaintiff to pay the costs of the summons to dismiss. There is no English authority on the point, but it is adverted to in *Sampson* v. *O'Donnell* (1) and *O'Connell* v. *O'Connell* (2), which was decided upon the corresponding Irish rule. In *Gill* v. *Woodfin* (3), in the analogous case of default of delivery of defence, it was held that the statement of defence, though put in after time, could not be treated as a nullity, and that the plaintiff was not entitled to judgment in default. The jurisdiction is fettered by the words of the rule: "and on the hearing of such application . . . . if no statement of claim shall have been delivered . . . ."

E. W. Hansell, for the respondents. Lord Coleridge J. thought that the Master's order was right, (1.) because the plaintiffs deliberately disregarded the two peremptory orders, and (2.) because, having regard to the trumpery nature of the action, there was no case for indulgence. It is submitted there was ample jurisdiction to make the order. It is a matter of discretion, and the Court is not tied and bound by the form of the rule. The Court will not interfere. If the plaintiff is out of time, but delivers a statement of claim before the defendant has applied under rule for dismissal of the action, then no order will be made. But if delivery is made after the defendant has applied to dismiss, then there is jurisdiction to make the order. In neither of the Irish cases was there any

(1) (1880) 6 L. R. Ir. 471. (2) (1880) 6 L. R. Ir. 470.
(3) (1884) 25 Ch. D. 707.

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application to dismiss; if there had been, an order would have been properly made.

Herbert Jacobs replied.

SWINFEN EADY L.J. This is an appeal from an order of Lord Coleridge J. in chambers affirming an order of the Master whereby the action was dismissed.

The writ in the action was issued on August 1, 1917, claiming damages against the defendants as solicitors for negligence and delivery up of a lease and damages for detaining the same. An order was made in October for delivery of a statement of claim within twenty-one days, and from time to time, and ultimately by two peremptory orders, the period was enlarged. The statement of claim had not been delivered at the expiration of the period fixed by the second of these orders, which was November 22, 1917. It was delivered on November 23, so that on November 26, when a summons to dismiss the action for want of prosecution came before Master Jelf, the statement of claim had been delivered, although out of time. The Master ordered the action to be dismissed, and Lord Coleridge J. affirmed this order. The question is whether that order was right.

Order XXVII., r. 1, provides that "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution." That the defendants did in this case; they took out a summons to dismiss the action for want of prosecution. Then the rule goes on: "and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered, order the action to be dismissed accordingly. . . . ." In my opinion that means if no statement of claim shall have been delivered when the summons to dismiss for want of prosecution is being heard. That is the necessary meaning of the rule, otherwise the words "if no statement of claim shall have been delivered" are meaningless and add nothing to what goes before, because by the earlier part of the rule it is assumed that a time has been fixed for the delivery of the statement of claim and that the plaintiff has not delivered it within due time; so that if

the expression "if no statement of claim shall have been delivered" in the latter part of the rule were taken to refer only to the statement of claim not having been delivered within the time limited, it would be redundant and have no meaning.

The meaning of the rule is that, on a summons to dismiss for want of prosecution, the action cannot be dismissed if at the time the summons comes before the tribunal to be dealt with the statement of claim has actually been delivered, though out of time; but justice will be administered by making the defaulting party pay all the costs.

It follows that the order made below dismissing the action was erroneous and must be discharged.

[His Lordship then dealt with the question of costs, and, after reviewing the facts, held that the proper order to make in the circumstances was to discharge the order in the Court below, to order the plaintiffs to pay to the defendants the costs of the application to the Master, and to direct that the costs of the appeal to the judge and to the Court of Appeal should be costs in the action.]

WARRINGTON L.J. I am of the same opinion. In this case Lord Coleridge J., purporting to act under Order XXVII., r. 1, has made an order dismissing the action for want of prosecution. If, as is contended on behalf of the defendants, such an order was in the discretion of the learned judge, then I certainly am not prepared to say that he has wrongly exercised that discretion; but the question is whether in such a case as this the judge has a discretion to order the action to be dismissed for want of prosecution. In the present case the plaintiffs were bound to deliver a statement of claim within a certain time, but they did not do so. The defendants applied to have the action dismissed for want of prosecution, and after the application had been made, but before it was heard, the statement of claim was delivered. Under those circumstances, what is the true construction of the rule? The rule is in these terms: "If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs, for want of prosecution." So far there is no difficulty. The right to have the action dismissed

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Warrington L.J.

for want of prosecution arises if the plaintiff being bound to deliver a statement of claim within a fixed time does not do so. Then the rule goes on, after a complete break in the sense and grammar: "and on the hearing of such application the Court or judge may, if no statement of claim shall have been delivered,"—no reference is there made to the time within which it is to be delivered, but if it has not in fact been delivered—"order the action to be dismissed accordingly, or may make such other order on such terms as the Court or judge shall think just." In my judgment, on the true construction of that rule, the period before which it is necessary to consider whether the statement of claim shall have been delivered under the latter part of the rule is clearly the last antecedent period, namely, the hearing of the application. There is nothing in the phraseology used in the last part of the rule to limit the time in which the statement of claim is not to have been delivered except the last antecedent period referred to in the rule. The rule, in my opinion, clearly contemplates that, if in fact a statement of claim has been delivered before the hearing of the summons to dismiss, it shall not be ignored. The action in that case cannot be said not to be being prosecuted, and therefore an order cannot be made dismissing the action for want of prosecution; but such other order may be made as the Court or judge shall think just, and the defaulting party can be visited with costs. As to what is a just order to make in the present case, I agree with what has been said by Swinfen Eady L.J.

Appeal allowed.

Solicitors: *Theodore Roberts: William Sturges & Co.*

W. I. C.

NAYLOR, BENZON & CO., LIMITED *v.* KRAINISCHE INDUSTRIE GESELLSCHAFT.

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Jan. 16, 23.

[1917 N. 56.]

Contract—Illegality—Alien Enemy—Suspension Clause—Dissolution—Implied Condition—Public Policy.

By a contract made before the war a British firm agreed to sell and an Austrian firm agreed to buy certain iron ore at a price to include cost, freight and insurance to Servola, near Trieste, payable in cash on receipt of invoice for each shipment. Delivery was to be in about equal quantities in two years and shipments were to be at as regular intervals as could be arranged. The contract contained a suspension clause providing that in case of stoppage of mines or works or of loss or delay during transit owing to accidents, strikes, lock-outs, wars, civil commotions, epidemics, quarantine, dangers of the sea, or any other cause beyond the control of the sellers or the buyers deliveries might be wholly or partially suspended by the sellers or the buyers during the continuance of the same without liability; but the buyers undertook to receive any quantities for which the sellers should have engaged freight before receiving advice of the stoppage. The contract also contained an arbitration clause providing that any dispute arising out of the contract was to be referred to arbitration in London. When a part of the ore had been delivered war was declared between the United Kingdom and the monarchy of Austria-Hungary. As to further deliveries:—

Held: (1.) That, apart from the suspension clause, the contract was dissolved from the date of the declaration of war.

Esposito v. *Bowden* (1857) 7 E. & B. 763 followed.

(2.) That the suspension clause made no difference in that respect, (*a*) because the war now being waged was not such a war as was provided for by that clause; (*b*) because even if it were, the clause only provided for postponement of deliveries until the end of the war and left the other terms of the contract, including the arbitration clause, in force during the war.

(3.) That, assuming the suspension clause operated to postpone all contractual rights and duties till the end of the war, the contract was none the less dissolved—

(*a*) through the alteration caused by the war in the circumstances contemplated by the parties as the basis of the contract:

Horlock v. *Beal* [1916] 1 A. C. 486 and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 followed;

(*b*) on grounds of public policy:

Zinc Corporation v. *Hirsch* [1916] 1 K. B. 541 and *Clapham Steamship Co.* v. *Handels-en Transport-Maatschappij Vulcaan of Rotterdam* [1917] 2 K. B. 639 followed.

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Dictum of Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines* [1902] A. C. 484, 491, doubted.

Dictum of Lord Parker in *Daimler* v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307, 347, and decisions in *Hugh Stevenson & Sons* v. *Aktien-Gesellschaft für Cartonnagen-Industrie* [1917] 1 K. B. 842 and *Tingley* v. *Müller* [1917] 2 Ch. 144, distinguished.

TRIAL of action before McCardie J. without a jury.

The plaintiffs were a limited company carrying on business as merchants of iron ore and pyrites in the City of London. The defendants were an Austrian company carrying on business as iron masters at Assling-Huette, Krain, in the monarchy of Austria-Hungary.

The plaintiffs claimed a declaration that the contract mentioned below, dated February 20, 1912, and made between themselves and the defendants, was as from August 12, 1914, dissolved by the existence of a state of war between this country and Austria-Hungary and that the plaintiffs were released and absolved from any obligation to make any further deliveries thereunder to the defendants. Alternatively they claimed a declaration that the contract became dissolved before the issue of the writ by the continued existence of a state of war and that they were released and absolved as aforesaid.

By the terms of the contract the plaintiffs agreed to sell and the defendants agreed to buy about 40,000 tons of Hamed iron ore. The price and place of delivery were 16*s.* per ton of 1016 kilos. c.i.f. Servola. The terms of payment were net cash on receipt of invoice for each shipment. The times of delivery were about 20,000 tons during 1914 and about 20,000 tons during 1915. Shipments were to be made in cargoes at as regular intervals as could be arranged. The contract contained stipulations as to the quality of the ore, rate of delivery, sampling and analysis, and payment of import duty. It also contained the following clauses :—

" In case of stoppage of mines or works, or of loss or delay during transit, owing to accidents, strikes, lock-outs, wars, civil commotions, epidemics, quarantine, dangers of the sea, or any other cause beyond the control of sellers or buyers, deliveries now contracted for may be wholly or partially suspended by sellers or buyers during the continuance of same without liability,

buyers however undertake to receive any quantities for which sellers may have engaged freight before receiving advice of such stoppage . . . ."

" Any dispute arising out of this contract shall be referred to two arbitrators in London in the usual manner."

Before August 12, 1914, the plaintiffs had delivered to the defendants under the contract 10,127 tons of ore. They had made no further delivery since that date, and there remained undelivered 29,873 tons.

The plaintiffs claimed a declaration that this contract was dissolved as aforesaid.

Stuart Bevan, for the plaintiffs.

Le Quesne, for the defendants.

The arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

Jan. 23. McCARDIE J. read the following judgment:—The plaintiffs seek a declaration that a written contract made between the defendants and themselves was dissolved by the outbreak of war with Austria on August 12, 1914.

The plaintiffs are an English company registered under the Companies Acts; their office is in London. The defendants are an Austrian corporation; their office is in Austria. The contract, dated February 20, 1912, was a sale by the plaintiffs to the defendants of 40,000 tons of iron ore. The price was 16*s.* per ton c.i.f. Servola. Servola is a port adjacent to Trieste. The bargain provided that about 20,000 tons should be delivered during 1914 and about 20,000 tons during 1915. Shipments were to be made at regular intervals as should be arranged. Up to August 12, 1914, the plaintiffs had duly delivered about 10,000 tons to the defendants. Upon the outbreak of war a balance of about 30,000 tons was therefore outstanding.

Several points of general importance were argued before me by Mr. Bevan for the plaintiffs and by Mr. Le Quesne for the defendants. Their arguments were full and able.

The contract was made in London. It is in English form, and it must, therefore, be construed according to English law: see *Jacobs*,

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Marcus & Co. v. *Crédit Lyonnais* (1), per Bowen L.J. But for the fact that the agreement contained a suspension clause the case would present no difficulty, for, apart from such a clause, the contract, if carried out, would clearly have involved a trading with the enemy and would therefore have been avoided by the war: *Esposito* v. *Bowden*. (2) It matters not whether the contract be beneficial or not to the English subject. Dissolution takes place irrespective of business loss or gain. The question to be asked in such cases is this: What dealings or communications would or might in the ordinary course of contractual performance have taken place between the parties but for the intervention of war and a consequent prohibition of intercourse. That, as far as I can see, was the test applied in *Esposito* v. *Bowden* (2), and is perhaps the only test applicable to the matter. It has been assumed in many decisions. It has been most recently stated by Pickford L.J. in *Rio Tinto Co.* v. *Ertel Bieber & Co.* (3)

It therefore becomes necessary to consider the suspension clause before me and to ascertain its true scope, intent, and effect. It is as follows: "In cases of stoppage of mines or works, or of loss or delay during transit, owing to accidents, strikes, lock-outs, wars, civil commotions, epidemics, quarantine, dangers of the sea, or of any other cause beyond the control of sellers or buyers, the deliveries now contracted for may be wholly or partially suspended by sellers or buyers during the continuance of same without liability, buyers however undertake to receive any quantities for which sellers may have engaged freight before receiving advice of such stoppage." But the contract also contained an arbitration clause as follows: "Any dispute arising out of this contract shall be referred to two arbitrators in London in the usual manner." The suspension clause cannot, I think, be considered apart from the provision as to arbitration. The consideration of this suspension clause involves several points. The relevant authorities are numerous. The majority have sprung into existence since the occurrence of the present war. The older decisions have been much considered and frequently restated within the last two years. Some of the principles at issue are now, in my opinion, settled with reasonable

(1) (1884) 12 Q. B. D. 589, 600. (2) 7 E. & B. 763.
(3) (1917) 116 L. T. 810, 814.

clearness; but they are not yet finally developed. Their application is ofttimes difficult. In the course of this judgment I shall formulate rather than fully examine the relevant authorities. In view of the weight of opinion and the divergence of dicta this task is one of delicacy and difficulty to a judge of first instance. But diffidence must not prevent the performance of duty. I will deal with the points involved under separate heads. First, what is the true effect of the suspension clause in the present contract? It is to be observed that the clause is not an exception in favour of one party only. If it had been, it must have been construed with strictness against the person invoking it. But it applies in cases covered by it to one party as much as to the other; hence it must receive a balanced and business interpretation. It is essential to remember, however, that words, even though general, must be limited to circumstances within the contemplation of the parties: *Baily* v. *De Crespigny* (1), per Hannen J.; *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2), affirmed by the House of Lords. (3) A substantially similar rule was observed by the House of Lords in *Glynn* v. *Margetson & Co.* (4) and by the Court of Appeal in *Smith* v. *Rex.* (5) The suspension clause contains the word "war." This word is uncertain in its scope. Its ambit varies with the nature and provisions of the contract and the general circumstances of the case. The Court must consider in each case the scope of its significance: see, for example, *Avery* v. *Bowden.* (6) In policies of insurance or charterparties a broad meaning is often to be given to the word.

Now what is the interpretation of the present clause? In my view its scope is strictly limited. I am satisfied that it does not extend to a direct war between Austria and the United Kingdom, The words of the clause are appropriate to wars which affect the buyers only and to wars which affect the sellers only, and perchance to wars between other countries than the United Kingdom and Austria which affect both buyers and sellers. But in my view they are inappropriate to the case of war between Austria and this country. The words relate to (*a*) the stoppage of mines or works,

(1) (1869) L. R. 4 Q. B. 180, 185.
(2) [1917] 2 K. B. 1, 31.
(3) [1918] A. C. 119.
(4) [1893] A. C. 351.
(5) (1917) 116 L. T. 515.
(6) (1855) 5 E. & B. 714.

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and (*b*) to loss or delay in transit, owing to the causes mentioned. Here there has been no stoppage of the plaintiffs' mines and no stoppage of the defendants' works, nor has there been any loss or delay in transit. The disturbances indicated by the clause are local. The words contemplate that either side may in their discretion decide to stop either wholly or partially the making or taking of deliveries if one of the enumerated causes operates. They contemplate, further, that advice shall be given by one side to the other of partial or complete stoppage. The words "buyers, however, undertake to receive any quantities for which sellers may have engaged freight before receiving advice of such stoppage" support, I think, my view of the meaning of the clause. The arbitration clause is equally significant. It covers disputes under the suspension clause as fully as disputes under the earlier provision of the contract. In my opinion the suspension clause is, therefore, inapplicable to the case of war between the United Kingdom and Austria. War effects a supreme administrative intervention. It precludes all intercourse between the parties. It results in extreme consequences. Such a war, I am satisfied, was quite beyond the contemplation of the parties and quite outside the scope of this suspension clause. If I may say so with great respect, I feel that possibly the Courts in the past may sometimes have assumed that the word "war" bore a scope and effect beyond that actually contemplated by the parties. If the limited sense in which the word is oftimes used in such contracts as the present be remembered, difficulty may be avoided. Inasmuch, therefore, as the present war between Austria and this country is not dealt with by the contract, it follows that there is nothing to prevent the application to the present case of the rule in *Esposito* v. *Bowden*. (1)

Secondly, I will now assume, however, that the suspension clause here was meant to cover war between Austria and this realm. If such be the case, how then does the matter stand? I have pointed out that the clause contemplates that advice of stoppage shall be given by the sellers in certain cases. I have also pointed out that in my opinion the arbitration clause covers any dispute which may arise as to the question of stoppage and as to the rights of the parties with respect thereto. It follows, therefore, that even if

(1) 7 E. & B. 763.

the suspension clause covers the present war, yet the contract contemplates a continuance of intercourse between the parties after the outbreak of war. It must be remembered that in 1912 the state of the law as to intercourse between enemies and as to the effect of the outbreak of war on contracts was but little understood. Lawyers were in doubt and laymen in confusion as to the law when the events of August, 1914, broke out. Much argument was needed and several decisions were required ere the law as it now stands was settled. I see no reason, therefore, for doubting that if the contract contemplated war between this country and Austria it contemplated also a continuance of a certain measure of intercourse after the commencement of conflict. But it was settled by *Esposito* v. *Bowden* (1) that commercial correspondence between English citizens and enemies was prohibited. It is now also settled that as a matter of rigid law all intercourse, whether commercial or otherwise, is prohibited: *The Panariellos* (2), affirmed in the Privy Council (3); *Robson* v. *Premier Oil and Pipe Line Co.* (4); *Tingley* v. *Müller* (5), per Warrington L.J. It is clear, I think, that arbitration cannot take place without intercommunication and the transmission of notices between the parties. Hence an arbitration clause, if contemplated by the parties as one which will be operative after the outbreak of war, involves intercourse with the enemy State: *Zinc Corporation* v. *Hirsch* (6), per Swinfen Eady L.J. and *Rio Tinto Co.* v. *Ertel Bieber & Co.* (7), per Pickford and Scrutton L.JJ. Hence it follows that the present contract is avoided, even if it contemplated a possible war between Austria and this country and a suspension of deliveries by reason thereof, for it also contemplated intercourse between the parties after the outbreak of hostilities. I deem it to be a true rule of law that if the contract in the ordinary course of performance or the settlement of disputes would require any intercourse at all after the outbreak of war, then the contract is dissolved, not only as to future acts of performance, but absolutely and in toto as to all future duties, rights, and obligations.

(1) 7 E. & B. 763.
(2) (1915) 112 L. T. 777.
(3) (1916) 114 L. T. 670.
(4) [1915] 2 Ch. 124.
(5) [1917] 2 Ch. 144, 166.
(6) [1916] 1 K. B. 541, 556.
(7) 116 L. T. 810, 814, 816.

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In the argument before me the word "suspend" was discussed. That word may bear at least three meanings: (1.) it may mean that on the outbreak of war the whole contractual obligations, whether of delivery, notice, arbitration, or otherwise, are immediately and completely suspended until the resumption of peace; (2.) it may mean that on the outbreak of war deliveries only are suspended, that is, postponed till the close of war, but that otherwise the contractual rights and duties remain unimpaired; (3.) it may mean that as from the outbreak of war deliveries are suspended, that is pro tanto cancelled during war, but that otherwise the contractual rights and duties remain unimpaired. The present case, I think, clearly does not fall within head (1.), nor does it fall, in my view, within head (3.). It falls, in my opinion, within head (2.). It is well in each of these cases to ascertain clearly the sense in which the word "suspend" is used. Unless the sense be determined, it is difficult to measure the nature of the contractual rights and duties and the intended extent and operation of an arbitration clause. The word "suspend" was considered by the Court of Appeal in *Zinc Corporation* v. *Hirsch* (1) and by Rowlatt J. in the case of *Distington Hematite Iron Co.* v. *Possehl & Co.* (2)

The above observations suffice to dispose of the present case, but as further points were discussed before me it is better that I should briefly deal with them. I will therefore assume that the suspension clause contemplated an outbreak of war between the United Kingdom and Austria, and that it operated also to suspend not deliveries only but all intercourse between the parties. The question, I think, still arises, even on that assumption, as to whether the contract has been dissolved or not. For the events which have taken place may be such as to be outside the clause, even though construed in the manner most favourable to the defendants. The principle applicable is, I think, clearly stated in the judgment of Lord Haldane in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3) as follows: "Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are

(1) [1916] 1 K. B. 541. (2) [1916] 1 K. B. 811.
(3) [1916] 2 A. C. 397, 406.

deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." The opinions of the members of the House of Lords in *Tamplin's Case* (1) show an agreement in the principle but a difference as to its application to the facts of that case: see per Lord Cozens-Hardy M.R. in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2) The principle is one of great value. If applied, it may solve many cases. It was, I think, the principle on which the Court of Appeal decided the case of *Scottish Navigation Co.* v. *Souter & Co.* (3) It was also the principle which governed the decision of the Court of Appeal in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4), and the affirmation of that decision by the House of Lords. (5) A clause, though broad in its meaning, may not cover a set of facts so fundamental and far-reaching in extent and operation and so prolonged in duration as to change the whole circumstances of the contract and the character of its performance. The war has involved vast changes. It has now lasted several years. The end is not in sight. During the whole period of the war, as I have already pointed out, supreme administrative intervention has prevented any communication between the parties. The position of shipping has wholly changed. Trade rests on a different basis. Prices and freights are already uniquely high. At the conclusion of war new conditions of trade and transport will spring into being. The day of peace will not restore the old conditions. Imperial policy may operate in unexpected ways. Can such a set of circumstances have been in the mind of these parties when they made the bargain of February 20, 1912? In my opinion the answer is No. My view in the present case is strengthened by the fact that here the period of normal performance of the contract ended in December, 1915. Two years have elapsed since then. The contract contemplated a temporary suspension only and not the prolonged intermission and changes which have actually taken place. If the circumstances are wholly outside the contemplation of the parties, then a term should be implied that in such a case the contract should cease: *Tamplin's Case* (6), per Lord Loreburn. It was upon this principle, I feel,

(1) [1916] 2 A. C. 397.
(2) [1917] 2 K. B. 1, 20.
(3) [1917] 1 K. B. 222.
(4) [1917] 2 K. B. 1.
(5) [1918] A. C. 119.
(6) [1916] 2 A. C. 397, 403.

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that the case of *Horlock* v. *Beal* (1) was decided: *Tamplin's Case* (2), per Lord Loreburn. I have considered the decision of Rowlatt J. in *Distington Hematite Iron Co.* v. *Possehl & Co.* (3) In spite of the suspension clause there existing he held that the war had dissolved the contract. His decision has been approved by Lord Finlay in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4) In my opinion, the decision of Rowlatt J. substantially rests on the principle I have stated, namely, that a revolution of circumstances may effect a dissolution of contract. As Rowlatt J. said (5), "To affirm such a contract as standing generally although at the present time and for an indefinite period it cannot be acted on is not to maintain the original contract, but to substitute a different contract for it." I have also considered the decision of Rowlatt J. in *Clapham Steamship Co.* v. *Handels-en Transport-Maatschappij Vulcaan of Rotterdam.* (6) A suspension clause existed in that case also. The learned judge there held the view that the contract was dissolved upon the ground of public policy. I venture to think, however, that his decision may be also supported on the principle I have stated. I will hereafter say a few words on the question of public policy.

In the course of the arguments before me the decision of Bray J. in the case of *Naylor, Benzon & Co.* v. *Hirsch* (7) was cited. In that case there was also a suspension clause. But the learned judge held that it did not cover the circumstances which had arisen, and that the contract had become "commercially impracticable" and was therefore dissolved. In my view he merely applied the principle I have already stated. The juristic meaning of the phrase "commercially impracticable" can only be this, I think, that the contract cannot be applied to circumstances which could not have been within the contemplation of the parties when the contract was made: *Jackson* v. *Union Marine Insurance Co.* (8), per Brett J. and *Bush* v. *Whitehaven Trustees* (9), per Lord Coleridge C.J.

A final point was argued before me, namely, that a suspension

(1) [1916] 1 A. C. 486.
(2) [1916] 2 A. C. 397, 403.
(3) [1916] 1 K. B. 811.
(4) [1918] A. C. 119.
(5) [1916] 1 K. B. 814.
(6) [1917] 2 K. B. 639.
(7) (1917) 33 Times L. R. 432.
(8) (1873) L. R. 8 C. P. 572, 581.
(9) (1888) 52 J. P. 392, 393.

clause operating in such a contract as the present to postpone deliveries until after the conclusion of war was against public policy and therefore void. This question is a grave one. It involves considerations which are not confined to the present contract or the present war. I ought perhaps to state that by s. 2 of the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), the Board of Trade may cancel any contract with an enemy if it appears to the Board that such contract is injurious to the public interest. In my view this provision is of vital importance. The time has perhaps come when the Board of Trade should review the range of existing contracts with enemies and should decide the questions of great economic urgency which obviously arise upon the section. But the existence of the Act of Parliament does not absolve the Court from deciding the questions which arise in pending actions.

In the present case I point out that there is no express restriction of sales by the plaintiffs during the period of suspension. In *Zinc Corporation* v. *Hirsch* (1) such an express restriction existed. But upon the question of public policy I see no distinction between an express restriction and the business restriction which necessarily results where a vendor is embarrassed and fettered by forward contracts. In the case before me the plaintiffs' managing director, Mr. Hay, pointed out the effect upon the plaintiffs' business if this contract remains operative at the close of the war. The plaintiffs must, if the bargain be binding, provide for the fulfilment of the contract. Freights are already vastly higher than before the war. Tonnage is ever more difficult to get. The price of the ore is already 50 per cent. higher f.o.b. than before the war. The plaintiffs' ore is largely used for steel wherewith to make munitions of war for the British Government. In the view of Mr. Hay, the value of ore and the cost of tonnage will be equally high at the conclusion of the war. The result is that the plaintiffs are and will be hampered if the contract holds, whilst the enemy defendants will possess an asset of great value in their rights against the plaintiffs. In these circumstances I am asked by the plaintiffs to say that public policy would invalidate the clause, assuming that it applied to the present war and operated in entire suspension of the whole of the respective rights and obligations of the parties.

(1) [1916] 1 K. B. 541.

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The question of public policy may well give rise to a difference of judicial opinion. Public policy, it was said by Burrough J. in *Richardson* v. *Mellish* (1), "is a very unruly horse, and when once you get astride it you never know where it will carry you." But the Courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In *Janson* v. *Driefontein Consolidated Mines* (2) Lord Halsbury L.C. said: "I deny that any Court can invent a new head of public policy." I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In *Wilson* v. *Carnley* (3) the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promisee was at the time of making the promise married is void as being against public policy. This decision marked a new application or head of public policy. In *Neville* v. *Dominion of Canada News Co.* (4) the Court of Appeal held, affirming Atkin J., that an agreement by a journalist not to comment upon the plaintiff's company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In *Horwood* v. *Millar's Timber and Trading Co.* (5) the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. This view is exemplified by the decisions which were discussed by the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (6) The general economic considerations to which the Courts will have regard were indicated by Lord Parker in delivering the judgment of the Privy Council in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (7); see also the judgment of Lord Haldane in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (8) The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground

(1) (1824) 2 Bing. 229, 252.
(2) [1902] A. C. 484, 491.
(3) [1908] 1 K. B. 729.
(4) [1915] 3 K. B. 556.
(5) [1917] 1 K. B. 305.
(6) [1894] A. C. 535.
(7) [1913] A. C. 781, 809, 810.
(8) [1914] A. C. 461, 469, 471.

does not vary. As it was put by Tindal C.J. in *Horner* v. *Graves* (1), "Whatever is injurious to the interests of the public is void, on the grounds of public policy." Now on looking at the famous judgment of Lord Stowell in *The Hoop* (2) it will be seen that the prohibition of intercourse with enemies is based in his view on public policy. I think, too, that the decision in *Esposito* v. *Bowden* (3) substantially rests on the same basis. Upon turning to the judgment of Lord Davey in *Janson* v. *Driefontein Consolidated Mines* (4) it will be seen that he states expressly that the rule first established in *The Hoop* (2) rests "on distinct grounds of public policy." Hence I see no ground for omitting to consider the question of public policy in respect of a suspension clause contained in an ante-war contract with one who is now an enemy, even though public policy sometimes be an unsafe ground for decisions: see per Lord Davey in *Janson's Case*. (5) Indeed, in the passage from Lord Halsbury's opinion in *Janson's Case* (6), already referred to, that great lawyer expressly refers to the rule against "assisting the King's enemies" as a recognized head of public policy. How, then, do the most recent authorities stand with respect to the validity of a suspension clause in such a contract as the present? They may be briefly mentioned. In *Zinc Corporation* v. *Hirsch* (7) Swinfen Eady and Pickford L.JJ. both expressed their view that the suspension clause in the contract there in question was, when taken in conjunction with the restriction clause, against public policy. As I have already said, I feel that it is not material whether there be an express restriction clause if there be the implied but necessary restriction of business arrangements resulting from a binding forward contract, In *Rio Tinto Co.* v. *Ertel Bieber & Co.* (8) Pickford L.J. apparently, and Scrutton L.J. certainly, approved the view of Swinfen Eady L.J. in *Zinc Corporation* v. *Hirsch*. (7) The judgment of Scrutton L.J. is emphatic. In the *Clapham Steamship Case* (9) Rowlatt J. clearly followed the view of Swinfen Eady L.J., although no restriction clause existed in that case. The learned judge pointed out that the

(1) (1831) 7 Bing. 735, 743.
(2) (1799) 1 C. Rob. 196.
(3) 7 E. & B. 763.
(4) [1902] A. C. 484, 499.
(5) [1902] A. C. 500.
(6) Ibid. 491.
(7) [1916] 1 K. B. 541.
(8) 116 L. T. 810.
(9) [1917] 2 K. B. 639.

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McCardie J.

effect of the suspension clause would be to fortify the present commercial position of the enemy apart from the question of his strengthened position at the conclusion of war. It was argued, however, by Mr. Le Quesne that the above views are in opposition to the weighty and well-known dictum of Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1) to the effect that "the prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." That dictum received the approval of Lord Mersey, Lord Kinnear, and Lord Sumner. It has also received the approval of Lord Cozens-Hardy M.R. and of other members of the Court of Appeal, including Swinfen Eady L.J. in the most recent case of *Tingley* v. *Müller*. (2) But in my humble view the explanation of the matter lies in the opinion expressed by Pickford L.J. in *Rio Tinto Co.* v. *Ertel Bieber & Co.* (3), namely, that the two apparently conflicting views deal with different subject-matters. If enemy property be situate within this realm the Crown does not confiscate it. This prerogative of the Crown, though undoubtedly existent, has fallen into disuse. But, if it be not confiscated, then the accretions to such property, whether due to the exertion of a trustee or not, will also remain free from confiscation and will therefore enure to the benefit of the enemy. The latter follows from the former. The Crown can always exert its powers of seizure. It possesses a full control over property within the realm. That, I think, is the explanation of the decision of Swinfen Eady and Bankes L.JJ. in *Hugh Stevenson & Sons* v. *Aktien-Gesellschaft für Cartonnagen-Industrie* (4) in holding that the war did not forfeit either wholly or partly an enemy's interest in a partnership business in this country. Herein also lies, I think, the explanation of *Tingley* v. *Müller* (2), where the majority of the Court of Appeal held that a power of attorney given by one who became an alien enemy remained valid and enabled the attorney to sell effectually a leasehold house in this country. The question of public policy was not therefore dealt with by the Court of Appeal in that case, save in the dissenting judgment of Scrutton L.J.

(1) [1916] 2 A. C. 307, 347.
(2) [1917] 2 Ch. 144.
(3) 116 L. T. 810, 814.
(4) [1917] 1 K. B. 842: since affirmed [1918] A. C. 239.

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The views of Scrutton L.J. are consonant with the views of A. T. Lawrence J. in his dissenting judgment in *Hugh Stevenson & Sons' Case* (1). In the present action I am not dealing with enemy property within the kingdom, but with an executory business contract; nor am I dealing with a contract of such a special nature as a life insurance policy or the like. Questions may hereafter arise as to the application thereto of the rule I have stated.

I have considered the circumstances of this case with care, and I have also considered the general questions and considerations which arise in connection with it. As a result I have come to the conclusion, though not without doubt, that a suspension clause in such a contract as the present is, having regard to all the relevant circumstances, void as against public policy. I thus follow the view expressed by Rowlatt J. in the *Clapham Steamship Company Case.* (2) To maintain the contract during the war will support the enemy during the war. I venture to add the further reason that it will strengthen the enemy greatly after the war. Upon the circumstances before me in this case I feel that the words of Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (3) do not impugn the views I have expressed. Nothing that I have said weakens the rule that any debt or cause of action which accrued to the enemy before the war will remain to him, subject to the effect of the Trading with the Enemy Acts and the vesting of such a chose in action in the Public Trustee. The dissolution of the contract leaves such debts and causes of action as they existed at the outbreak of war: *Ex parte Boussmaker* (4); *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (5), per Lord Halsbury L.C.; *Chandler* v. *Webster* (6), per Romer L.J.

For the reasons given I therefore declare that the contract between the parties was dissolved by the outbreak of war with Austria on August 12, 1914. The defendants must pay the costs of the action.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Lawrance, Webster, Messer & Nicholls.*
Solicitors for defendants: *Waltons & Co.*

(1) [1917] 1 K. B. 842.
(2) [1917] 2 K. B. 639.
(3) [1916] 2 A. C. 307.
(4) (1806) 13 Ves. 71.
(5) [1903] 2 K. B. 756, 764.
(6) [1904] 1 K. B. 493, 501.

W. H. G.

1918
Jan. 11.

IN THE MATTER OF THE PETITION OF RIGHT OF THE NEW ZEALAND SHIPPING COMPANY, LIMITED.

Shipping—Transfer of Mortgage—Registration—Payment of Fees—Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 *Vict. c.* 44), *s.* 3; *First Schedule.*

By s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, "such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine, not exceeding those specified in the First Schedule to this Act . . . ." The First Schedule, which is headed "Table of Maximum Fees to be paid on the Registration, Transfer, and Mortgage of Ships," provides in the part headed "Transfer and Mortgage" as follows: "On transfer, transmission, registry anew, transfer of registry, mortgage, and transfer of mortgage. According to the gross tonnage represented by the ships or shares of ships transferred, &c. . . . . ":—

Held, that s. 3 and the schedule must be read together; that as the word "transfer" had been extended in the schedule to include "transfer of mortgage" the same meaning must be given to the word "transfer" in the section; and that therefore fees were payable under s. 3 to the registrar on the registration of the transfer of a mortgage of a British ship.

PETITION OF RIGHT.

The suppliants, the New Zealand Shipping Company, sought repayment of the sum of 135*l.* 7*s.* 6*d.* paid by them under protest to the registrar of British ships at Plymouth.

The suppliants were the owners of ships trading between Great Britain and New Zealand and other parts of the world. The ships were registered under the Merchant Shipping Act, 1894, as British ships at the port of Plymouth. For the purpose of securing an issue of 300,000*l.* debenture stock the suppliants executed a trust deed dated August 5, 1896, and in accordance with its terms the suppliants proceeded to create and to have registered in the names of the trustees first mortgages over the ships and shares of ships referred to in the trust deed. Each of the mortgages was in the statutory form, and was recorded in the register book at the port pursuant to s. 31 of the Merchant Shipping Act, 1894. One of the three trustees of the trust deed died on January 9, 1915, and the suppliants by an indenture dated March 23, 1915, in exercise of the

powers conferred upon them by the trust deed, duly appointed a new trustee to act jointly with the two surviving trustees. At the date of the death of the trustee there were existing twenty-eight mortgages in the statutory form of certain of the suppliants' ships or the several shares thereof as security under the provisions of the trust deed. On November 1, 1915, the mortgages were duly indorsed by the two surviving trustees with the names of the two surviving trustees and of the new trustee. Upon presentation of the indorsements to the registrar of British ships at Plymouth for the recording of the same pursuant to s. 37 of the Merchant Shipping Act, 1894, the registrar claimed the sum of 135*l.* 7*s.* 6*d.* as due under s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, and the First Schedule thereto, and refused to register the indorsements unless that sum was first paid by the suppliants. The suppliants accordingly paid the sum of 135*l.* 7*s.* 6*d.* under protest, and presented the petition of right to recover the same.

The suppliants contended (inter alia) that the appointment of a new trustee on the death of a former trustee with the resulting consequence, namely, the indorsement of the mortgages subject to the trusts of the trust deed and substitution of the name of the new trustee on the register of mortgages in place of the deceased trustee, was not a transfer, transmission, or mortgage of a British ship within s. 3 of the Act of 1898, nor a transfer of mortgage within the First Schedule to the Act so as to attract on registration thereof the duties or fees imposed under the section or schedule.

It was contended on behalf of the Crown (1.) that none of the Merchant Shipping Acts entitled the suppliants to have any of the instruments of transfer registered without payment of a fee; (2.) that the proceeding carried through by preparing and executing the instrument of transfer and getting it recorded by the registrar was in each case a "transfer of a mortgage" within the meaning of the First Schedule to the Act of 1898 so as to carry the statutory fee under the schedule; (3.) that the fees were in the nature of a payment for the protection and benefits arising to the suppliants out of the registration of the transfers.

The question for the opinion of the Court was whether the registrar was entitled to refuse to record the indorsements unless the sum of 135*l.* 7*s.* 6*d.* was paid by the suppliants.

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Ryde, K.C., and *A. M. Latter*, for the suppliants. No fees were payable by the suppliants to the registrar on the registration of this transfer of mortgage, as it was not a registration, transfer, or mortgage of a British ship within s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898. The liability to pay fees is created by that section; the First Schedule to the Act does not create any liability to pay fees, but merely defines the quantum of the liability created by the section. The section and the schedule must be read together. Under the section fees are made payable on (1.) the registration of a British ship, (2.) the transfer of a British ship, (3.) the transmission of a British ship, and (4.) the mortgage of a British ship. There is nothing in the section creating any liability to pay fees on the transfer of a mortgage. The words "registration, transfer (including transmission), and mortgage" in s. 3 of the Act of 1898 are used in the same sense as those words are used in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and they must be construed as having the same meaning. In the Act of 1894 ss. 24 to 30 form a group headed "Transfers and Transmissions," but those sections only deal with the transfer of ships or shares. Mortgages of ships or shares are dealt with in ss. 31 to 38. Sect. 37, which deals with transfer of mortgages, provides that on the production of such transfer the registrar shall record it in the register, but the section does not impose a duty upon any one to produce such transfer; the only obligation is one imposed upon the registrar to register. The words in s. 3 "not exceeding those specified in the First Schedule" are words of limitation. The schedule is headed "Table of Maximum Fees to be paid on the Registration, Transfer and Mortgage of Ships," and therefore does not purport to do more than to fix the limit within which the Board of Trade can impose fees. The term "transfer of mortgage" first occurs in the second part of the First Schedule, which is headed "Transfer and Mortgage," and provides: "On transfer, transmission, registry anew, transfer of registry, mortgage, and transfer of mortgage. According to the gross tonnage represented by the ships or shares of ships transferred, &c." That sentence cannot be applied to a transfer of a mortgage. The "&c." at the end of the sentence means "registered, transmitted, or mortgaged," but there cannot be such a participle as "transferred of mortgage." The words

" transfer of mortgage " in the schedule are not warranted by the section. This Act being a taxing Act must be construed strictly, and it is immaterial to consider what was the intention of the Legislature in passing the statute: see *Partington* v. *Attorney-General* (1); *Tennant* v. *Smith.* (2)

Giveen (*Sir Gordon Hewart, S.-G.*, with him), for the Crown. Sect. 3 of the Act of 1898 and the schedule to the Act must be read together in the light of the Merchant Shipping Act, 1894. It is important to note that in the Act of 1894 s. 37, which deals with transfers of mortgages, is included in the group of sections headed " mortgage." The Act of 1898 does not impose a tax; it merely imposes fees which are payable by persons desiring certain privileges. The statute does not impose a duty on the mortgagee to register the transfer of a mortgage; it merely provides that the transfer may be registered for the protection of the mortgagee, and for that benefit certain fees are required to be paid out of which the expenses of keeping the register are defrayed. The reasonable construction of the words " registration, transfer (including transmission), and mortgage of British ships " in s. 3 is that the word " transfer " includes a " transfer of mortgage."

[He was stopped.]

BAILHACHE J. The question which arises for decision on this petition of right is whether when a transfer of a mortgage of British ships and shares in such ships is produced to the registrar of British ships at the port of registry for the purpose of being recorded on the register the registrar is entitled under s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, to refuse to register the transfer unless the fees prescribed by that Act are paid to him. The material words of the section are: " Such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine, not exceeding those specified in the First Schedule to this Act." The First Schedule, which is headed " Table of Maximum Fees to be paid on the Registration, Transfer, and Mortgage of Ships," is divided into two parts. The first part deals with registration, and the second with transfer and mortgage. Under the

(1) (1869) L. R. 4 H. L. 100, 122. (2) [1892] A. C. 150, 154.

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heading "Transfer and Mortgage" the schedule provides: "On transfer, transmission, registry anew, transfer of registry, mortgage, and transfer of mortgage. According to the gross tonnage represented by the ships or shares of ships transferred, &c." In this case there was undoubtedly a transfer of mortgage. Mr. Ryde, on behalf of the suppliants, says that s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, does not contain any reference to the transfer of a mortgage; the section only refers to "registration, transfer (including transmission), and mortgage of British ships," and he says that the words "of British ships" must be read in after each of the words "registration," "transfer," "transmission," and "mortgage." Read in that way the section would read: "Such fees shall be paid in respect of the registration of British ships, transfer of British ships, transmission of British ships, and mortgage of British ships as the Board of Trade, with the consent of the Treasury, determine." He also says that as this statute is a taxing Act it is irrelevant to consider what the Legislature may have intended; one has to construe the exact words of the statute in their natural meaning, and if a case comes within the words of the section so construed fees are payable, but that if the case does not come within the words of the section fees are not payable, however analogous the case may be to a case which does actually fall within the section.

This Act obviously follows the lines of the Merchant Shipping Act, 1894, and must be read with that statute in mind. That Act deals with the registration, transfer and transmission of ships and with the mortgage of ships, and in the group of sections dealing with the mortgage of ships is a section dealing with the transfer of mortgage of a ship. Again, I cannot construe s. 3 of the Act of 1898 without reading it in connection with the schedule to that Act. If the section stood alone there would be, I think, notwithstanding that it follows the lines laid down by the Merchant Shipping Act, 1894, a great deal to be said in favour of Mr. Ryde's argument. But, turning to the schedule, I find that the schedule deals in express terms with transfers of mortgages and specifies the fees payable on transfers of mortgages. I have to read the section and the schedule together. Mr. Ryde says that the schedule is not a charging schedule; it in terms limits the fees which the Board of Trade

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may charge, and therefore he says you would not expect to find in that schedule authority to charge fees in respect of something which is not chargeable under the section which brings the schedule into operation. That is perfectly true; but I do not think it quite meets the question which I have to decide. That question is, what is the true meaning of the words "registration, transfer (including transmission), and mortgage of British ships" in s. 3 read together with the schedule? When I read the section and the schedule together I find that one or other of the terms "mortgage" or "transfer" is extended in the schedule to mean "transfer of mortgage." I am not at all surprised that it is so, because, although one must only look to the words of the Act and not outside to the reason for its enactment, there is not in point of fact the slightest reason why mortgages on registration should, while transfers of mortgages on registration should not, be subject to a fee. The registration of a transfer of mortgage involves the same amount of trouble and the same care as the registration of a mortgage. It is quite natural, therefore, that the schedule should expressly refer to transfer of mortgages and make fees payable in respect of transfers of mortgages as well as in respect of mortgages.

I have come to the conclusion that the registrar was right in demanding those fees, and that this petition must be dismissed.

Petition dismissed.

Solicitors for suppliants: *Cattarns, Cattarns & Harris.*
Solicitor for Crown: *Solicitor for the Customs and Excise.*

R. F. S.

1917
Dec. 10, 12.

COLE *v.* DE TRAFFORD (No. 2).

Negligence—Master and Servant—Injury to Servant—Duty of Master—Defective Premises—Concealed Danger.

Per Curiam (A. T. Lawrence and Shearman JJ.): The owner of a garage owes a duty to his chauffeur to take reasonable care to maintain the premises in a condition free from any concealed danger of which the owner is aware or ought to be aware.

On the facts of the case :—

Held by A. T. Lawrence J., that there was no evidence of a breach of this duty ; by Shearman J., that there was such evidence.

Appeal from the county court of Middlesex holden at Bloomsbury.

The plaintiff brought an action against the defendant, who was the wife of Sir Humphrey de Trafford, claiming damages for personal injuries sustained by him through the negligence of the defendant.

On May 18, 1916, the plaintiff was engaged by the defendant as a chauffeur. He lived with his wife over a garage hired by the defendant. The garage had folding doors. In the upper part of the folding door on the right-hand facing outwards was a glass window $1\frac{1}{2}$ feet by $2\frac{1}{2}$ feet of glass $\frac{1}{2}$ inch thick and weighing about 20 lbs. The upper edge was at a height of 8 feet 6 inches from the ground. On May 31 the plaintiff was opening the door from the inside in order to take in the defendant's car when the whole window fell out on his right hand. On examination it appeared that the inside beadings, originally $\frac{3}{8}$ inch, which with the help of some putty kept the glass in position on the inner side of the door, were missing at the top and on one of the sides, and that at some time or other a nail had been driven into the wood of the door at one of the top corners of the window to secure the glass. In the opinion of a surveyor who was called as a witness this dangerous condition, judging from the state of the putty, must have existed for some months, the glass getting gradually looser as time went on, especially as the plaintiff used a hose for the purpose of cleaning the windows. The plaintiff had not himself noticed the condition of the window during the thirteen days from May 18 to May 31.

At the end of the plaintiff's evidence it was submitted on behalf

of the defendant that there was no case to go to the jury. The point was reserved, and subject thereto the case was left to the jury. The defendant only called medical evidence. The county court judge put questions to the jury which with their answers were as follows :—1. Were the premises in a defective and dangerous condition ?—Yes. 2. Was the defendant negligent (*a*) in not discovering the defect ; (*b*) in not remedying the defect ?—Yes, to both questions. Damages, 70*l*.

The judge, after consideration of the point reserved, held that there was no evidence of negligence on the part of the defendant. He therefore gave judgment for the defendant.

The plaintiff appealed.

C. T. Williams and *E. Lewis Davies*, for the plaintiff. The county court judge was wrong in holding that there was no evidence of negligence on the part of the defendant. The duty of an employer to his servant is thus stated by Lord Herschell in *Smith* v. *Baker & Sons* (1) : "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." *Bartonshill Coal Co.* v. *Reid* (2), *Webb* v. *Rennie* (3), and *Murphy* v. *Phillips* (4) are to the same effect. An employer is bound to take reasonable care to see that his machinery, his works, his plant, or his premises are in proper condition. He must take care to prevent injury to his servants from dangers not only which he knows of but which he ought to know of : *Indermaur* v. *Dames*. (5) Would a reasonably careful employer looking at the door of this garage have seen that it was dangerous ? That is the question on which this case turns. It is a question of fact for the jury, and they have answered it in favour of the appellant.

du Parcq, for the defendant. The cases cited for the plaintiff relate to employment in dangerous operations such as mining, building, or working a crane. Even in such cases the employer is

(1) [1891] A. C. 325, 362.
(2) (1858) 3 Macq. 266.
(3) (1865) 4 F. & F. 608.
(4) (1876) 35 L. T. 477.
(5) (1866) L. R. 1 C. P. 274 ; (1867) L. R. 2 C. P. 311.

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not bound personally to inspect the machinery or plan. He discharges his duty if he employs a competent superintendent: *Wilson* v. *Merry*. (1) The negligence suggested in the present case is that the defendant did not look to the condition of the door. She was under no duty to do so. The mere relation of master and servant does not create any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself: *Priestley* v. *Fowler* (2); *Southcote* v. *Stanley* (3); *Seymour* v. *Maddox*. (4) The plaintiff himself, who knew at least as much about the garage as the defendant, failed to discover the danger; and there is no reason to suppose that if the latter had inspected it she would have been any more successful. She was certainly not bound to employ a surveyor to inspect the garage.

C. T. Williams in reply. *Southcote* v. *Stanley* (3) was not a case of master and servant, but of host and guest: see *Watling* v. *Oastler*. (5)

[*Burr* v. *Theatre Royal, Drury Lane* (6) was also cited.]

Cur. adv. vult.

Dec. 12. A. T. LAWRENCE J. read the following judgment:— This is an appeal from the county court of Middlesex holden at Bloomsbury. The action was brought to recover damages for personal injuries sustained by the plaintiff by the fall of a large and heavy pane of glass from the top of a garage door. The plaintiff was the defendant's chauffeur. The pane of glass in question fell from the door while he was opening it in the course of his duty as chauffeur. It struck his right hand and severely injured it. The question is whether the defendant is liable for the consequences of the injury to the plaintiff's hand.

At the end of the plaintiff's case it was submitted for the defendant that there was no case to go to the jury. It was thereupon agreed that without prejudice to that contention the case should go to the jury, and whatever the verdict might be the judge might enter judgment for the defendant if after argument he should be of

(1) (1868) L. R. 1 H. L. Sc. 326.
(2) (1837) 3 M. & W. 1.
(3) (1856) 1 H. & N. 247.
(4) (1851) 16 Q. B. 326.
(5) (1871) L. R. 6 Ex. 73.
(6) [1907] 1 K. B. 544.

opinion that there was no case. The defendant then called medical evidence as to the injury only.

The learned judge left two questions to the jury :—(1.) Were the premises in a defective and dangerous condition ? Answer, Yes. (2.) Was the defendant negligent (*a*) in not discovering the defect ; (*b*) in not remedying the defect ? Answer to both branches of this question, Yes. The jury assessed the damages at 70*l*. The case was afterwards argued, and the learned judge delivered a very careful and learned judgment dealing with the cases. In the result he came to the conclusion that there was no evidence upon which the jury could properly find that the defendant had been guilty of negligence causing the accident. We have to consider whether he was correct in that conclusion.

It is clear that there was ample evidence to support the finding of the jury upon the first question. The surveyor called for the plaintiff said the door was dangerous and defective, and the fall of this heavy sheet of glass when the door was being used in its ordinary manner clearly supported that view.

The difficulty in the case arises upon the answers to the second question. The onus is upon the plaintiff to prove that the injury was due to the negligence of the defendant without contributory negligence upon his part. Negligence involves a breach of duty, and the question whether the defendant was liable turns upon what was the duty which she owed to the plaintiff. I think the learned judge correctly held that duty as being to take reasonable care to maintain the premises in a condition free from any concealed danger of which she was aware or ought to have been aware. No evidence was given to show, or even to suggest, that the defendant was in fact aware of the defective condition of this door. The case turns upon whether there was evidence upon which a jury could properly find that she ought to have been aware of it. That does not depend upon whether a lady in her position would be aware of the condition of her garage door, but whether a reasonably careful employer of labour would or ought in the circumstances of the case to be aware of it. The glass in question was originally fixed in position on the inner side of the door by $\frac{3}{8}$ inch beadings around the edges of the glass. On the top and on one side this beading was missing, and in the top corner a nail had been driven into the wood

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of the door, apparently to supply the place of the missing beading by acting as a wedge pinning in the glass. This expedient had sufficed to keep the glass in position for some considerable time; but for how long no evidence was given. There was putty which had perished, from which the inference was drawn that it had been in this condition for some months. This is not a case of machinery which from its nature is likely to get out of order, or of plant subjected to strain in use; in these cases expert inspection and timely testing may reasonably be part of the employer's duty. This door was a structure likely to last for many years. The glass was ½ inch thick, and if the beadings had been fixed with sprigs or nails instead of putty the glass would probably have remained in position during the life of the door. The plaintiff had been in occupation of this garage, dwelling in the rooms over it for a fortnight. He had been opening and closing this door daily every time he used the car. He had also cleaned this glass with a hose-pipe, but had never noticed the defect in question here. The glass was considerably above the level of the eye, and the defect could not have been conspicuous or obvious, otherwise it must have been noticed by an experienced chauffeur who every day manipulated this door. I do not think it possible to say that the duty the employer owes to his servant to detect secret defects in the condition of his premises is greater than that which the servant owes to himself. If the employer had visited the garage every day for the previous fourteen days there is no reason to suppose she would have discovered the defective condition of this door any more than the chauffeur discovered it; and it was no more a want of reasonable care upon her part than it was upon his. The truth appears to me to be that this injury was sustained without negligence either on the part of the plaintiff or of the defendant. It was upon the evidence a pure accident so far as both were concerned. The person who was guilty of negligence was the person who found the two pieces of beading when they came out and who placed the nail in the corner in lieu of them. There was no evidence that this person ever reported the defect to the defendant, and in the absence of such evidence, or of evidence from which this could properly be inferred, I do not think the jury were entitled to draw an inference against her merely from the fact that she did not go into the witness-box to deny that of which there was

no evidence. The existence of such a report, if it had been alleged, would have been an affirmative fact, and he who relied upon it must at least give some evidence of it, or of facts from which it could be properly inferred. I think the learned judge's judgment was correct and should be affirmed, and this appeal should be dismissed.

SHEARMAN J. I feel bound to give my reasons for differing from the conclusion of my learned brother, which I do with great diffidence. With his statement of the law as to the duty of an employer towards his servant I agree. The jury were asked whether the defendant was negligent in not discovering the defect. I agree that that was the question. The only comment I have to make is that the question does not relate to this particular employer, but to any reasonably competent employer. A number of cases have been cited, some dealing with the duty of an invitor to an invitee, others with persons engaged in dangerous employments, and others with domestic servants. This is not a case of invitor and invitee. Neither is it a case of a man engaged in a dangerous employment. The plaintiff's position was something midway between that of a man engaged in a dangerous employment and that of a domestic servant. The evidence shows that the garage where he was employed had an obviously heavy window kept in its place by means of putty and beading. Can it be said as matter of law that a reasonably competent person would not have seen that the beading had broken away? Some one had noticed it, because into the upper corner of the window he had driven a nail acting as a wedge to keep the glass in its place. That might be said to amount to an obvious danger. In my opinion the question whether it did or not was for the jury. This was not a case of contributory negligence, nor was it a case where the servant voluntarily undertook the risk of a known danger. This evidence being before the jury, it was submitted on behalf of the defendant that there was no evidence of negligence on her part. That point was reserved, but meanwhile the case was left to the jury, and they found for the plaintiff. The question we have to consider is whether there was sufficient evidence on which a reasonable jury could have come to that conclusion. The case is just the same as if the judge had tried the action alone and had found for the plaintiff. In my opinion we could not then have interfered with his finding because

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there was evidence to support it. The point that the plaintiff himself had not noticed the danger is an important point when addressed to the proper quarter; but it was for the jury, and not for this Court, to consider it. It affects the weight of the evidence. We have to deal not with the weight of evidence but with the existence of evidence. In my opinion there was evidence to support the finding of the jury, but, as my brother is of the contrary opinion, the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Berry, Tompkins & Co.*
Solicitors for respondent: *Eardley, Holt & Co.*

W. H. G.

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Dec. 10.

PARKER, GAINES & CO., LIMITED *v.* TURPIN.

Practice—Stay of Proceedings—Agreement to refer—Step in Proceedings—Order for Mutual Discovery—Election—Knowledge of Agreement to refer—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

A party to a written contract containing an agreement to refer disputes to arbitration was sued for breach of the contract. He was unaware that the contract contained an agreement to refer. The plaintiffs in the action took out a summons for discovery. The defendant asked for discovery also, and an order for mutual discovery was made. He then became aware of the agreement to refer and applied for a stay of proceedings in the action:—

Held, that he had taken a step in the proceedings within the meaning of s. 4 of the Arbitration Act, 1889, and therefore was not entitled to a stay.

Ives v. *Willans* [1894] 2 Ch. 478 distinguished.

APPEAL from an order of the county court of Yorkshire holden at Leeds.

The plaintiffs brought an action in the county court against the defendant for breach of a written contract containing an agreement to refer all matters in dispute to arbitration. The defendant took out a summons for particulars of the contract, the breaches alleged, and the amount claimed. The plaintiffs took out a summons for discovery of documents. The two summonses were heard together.

At the hearing the defendant's solicitor said that he required dis-

covery of the plaintiffs' documents, and the registrar made an order for mutual discovery.

The defendant having obtained discovery took out a summons to stay all further proceedings in the action pursuant to s. 4 of the Arbitration Act, 1889. (1) In an affidavit in support of this application he stated that he had never had in his possession a duplicate of the agreement of April 22, 1909, and was not aware of the existence of the arbitration clause until he obtained a copy of it from the plaintiffs. The county court judge accepted this statement of the defendant and, holding that the case came within the principle of *Ives* v. *Willans* (2), made an order staying the action.

The plaintiffs appealed.

Whately, for the appellants. This case cannot be distinguished in principle from *County Theatres and Hotels, Limited* v. *Knowles*. (3) Attendance upon a summons for directions and assent to an order made upon the opposite party constitute a step in the proceedings: *Cohen* v. *Arthur*. (4)

Lowenthal, for the respondent. It is not disputed that to attend on a summons for directions and accept an order for mutual discovery would be a step in the proceedings taken by a party, if he knew of the agreement to refer. The judgments of the Court of Appeal in *Ives* v. *Willans* (2) make it clear that the spirit and sense of s. 4 of the Arbitration Act, 1889, is the principle of election. Until a party has before him information enabling him to elect between trial before a Court of law and trial before an arbitrator he cannot be said to

(1) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4: "If any party to a submission . . . . commences any legal proceedings in any court against any other party to the submission . . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

(2) [1894] 2 Ch. 478.

(3) [1902] 1 K. B. 480.

(4) (1912) 56 Sol. J. 344.

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take a step. Before he can do that he must thoroughly understand the facts. The respondent until he became aware of the arbitration clause could not elect between arbitration and trial at law. There is nothing to prevent him from electing now.

Whately was not called upon in reply.

A. T. LAWRENCE J. The question in this case is whether the county court judge was right in staying the action in order that the matter in dispute might be referred to arbitration. The cause of action was a breach of contract of service by which the respondent agreed to serve the appellants as manager. The action was for breach of his duty as manager. The respondent has applied to stay the action. The appellants object that the respondent before his application had taken a step in the action, and that therefore s. 4 of the Arbitration Act, 1889, does not authorize his application and he is not entitled to a stay. The county court judge thought that the respondent was entitled to a stay on the authority of *Ives* v. *Willans*. (1) He has found as a fact that the respondent did not know of the arbitration clause in the contract, and we must take that to be the fact. Mr. Lowenthal has argued that, inasmuch as the respondent did not know of the arbitration clause, nothing that he did could be properly called a step in the action. He has cited *Ives* v. *Willans* (1) as supporting that contention. In my view that case does not help him. There what was unknown was the subject-matter of the action, and therefore the defendant could not know whether a Court of law or an arbitrator was the more suitable tribunal. The Court of Appeal held that a mere request for a statement of claim was not a step in the proceedings. That is easily intelligible. The defendant there was not applying to the Court for anything; he was merely saying, in the act of entering an appearance, that he wished to be further informed of the matter alleged against him. It is to be observed that s. 4 allows an application to stay at any time after appearance. It was held that the mere expression of a desire for a statement of claim was not a step in the proceedings. Mr. Lowenthal would apply the doctrine of election to these cases and carry it to its logical conclusion. He suggested that if a party does not know the full facts he cannot take a step in the proceedings

(1) [1894] 2 Ch. 478.

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which would preclude a stay and recourse to arbitration. The Court of Appeal did not mean to decide anything of that sort. The Court was dealing with the particular matter of demanding a statement of claim. It did not intend to give any countenance to the suggestion that a party may take any step however advanced in the action so long as he does not know of the arbitration clause, and then apply to have the action stayed. That is not the intention of s. 4. The words in their natural meaning indicate that if a party takes a step in the proceedings he cannot after that stay the action and proceed to arbitration. I should have been disposed to look leniently upon the respondent's application for particulars, if that had been the only step alleged, because the particulars were not very ample. But an application for discovery is a very different matter. I cannot agree with the decision of the county court judge. The appeal must be allowed.

SHEARMAN J. I am of the same opinion.

Appeal allowed.

Solicitor for appellants : *G. A. Herbert, for A. W. Willey, Leeds.*

Solicitors for respondent : *Surr, Gribble & Co., for C. F. Haigh, Leeds.*

W. H. G.

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Dec. 14.

THE KING *v.* WEST RIDING OF YORKSHIRE JUSTICES.

Licensing Acts—Refusal of Renewal of Licence—Appeal to Quarter Sessions—Costs incurred by Licensing Justices—Order for Payment out of County Fund—Indemnity to Licensing Justices—Costs of Application for Mandamus—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *& 1 Geo.* 5, *c.* 24), *s.* 31, *sub-s.* 1; *s.* 32, *sub-s.* 1.

By s. 31, sub-s. 1, of the Licensing (Consolidation) Act, 1910, where an appeal to a Court of quarter sessions from the refusal of the licensing justices of any licensing district to grant a renewal of a licence is dismissed, the Court of quarter sessions shall order the appellant to pay to the justices against whose decision he has appealed, "such sum by way of costs as is in the opinion of the court sufficient to indemnify those justices from all costs and charges whatsoever to which they have been put in consequence of his having served notice of his intention to appeal." By s. 32, sub-s. 1, "where an appeal under this Act . . . . is dismissed . . . . and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the court of quarter sessions shall order the treasurer of the county in which the licensing district for which the licensing justices act is situated . . . . to pay to the justices such sum as in the opinion of the court is sufficient to indemnify them from all costs and charges whatsoever to which they may have been put . . . ."

Licensing justices having refused an application for the renewal of a licence, the licensee and owners appealed to quarter sessions. At the appeal the licensing justices appeared and briefed leading counsel with a special fee of 25 guineas. The appeal was dismissed and the appellants were ordered by the Court of quarter sessions under s. 31 of the Act of 1910 to pay to the licensing justices costs sufficient to indemnify them from all expenses whatsoever to which they had been put by reason of the appeal. By consent the costs were taxed out of sessions, and on the taxation the clerk of the peace only allowed a special fee of 15 guineas for leading counsel thus taxing off 10*l.* 15*s.* from the amount actually paid to him by the licensing justices, and upon an application by the licensing justices to quarter sessions for an order under s. 32 of the Act for payment to them of the 10*l.* 15*s.* out of the county fund the application was refused. The licensing justices thereupon obtained a rule nisi for a mandamus to the Court of quarter sessions commanding them to make the order for payment to the licensing justices out of the county fund upon the ground that they were bound in law to make it:—

Held, that, in the circumstances, the fact that under s. 32 the 10*l.* 15*s.* would come out of a public fund, whereas under s. 31 it

would be paid by the appellants, was no justification for allowing it as costs under s. 32 when it had not been allowed under s. 31 under exactly the same order, and that the rule for the mandamus must be discharged with costs.

Held, further, that the Divisional Court had no jurisdiction under s. 32 to order the costs incurred by the licensing justices in making the application for the mandamus to be paid to them out of the county fund.

Reg. v. *Staffordshire Justices* (1898) 62 J. P. 741 not followed upon that point.

RULE NISI calling upon the respondents, the justices for the West Riding of Yorkshire, to show cause why a writ of mandamus should not issue directed to them commanding them to hear and determine, pursuant to the statutes in that behalf, an application for an order, and to make an order under s. 32 of the Licensing (Consolidation) Act, 1910, for the payment by the treasurer of the city and county borough of Sheffield to the applicants, the licensing justices of that city, of the sum of 10*l.* 15*s.*

On March 9, 1917, the Sheffield licensing justices refused to renew to one Walker the licence of the Bridge Inn, Sheffield. Walker and a firm of brewers who were the owners served notices of appeal to the West Riding Quarter Sessions. The clerk to the Sheffield licensing justices, by the special instructions of those justices, briefed leading counsel with a special fee of 25 guineas and a brief fee of 10 guineas to attend the appeal upon their behalf. The appeal was heard on July 6, 1917, when the Court of quarter sessions dismissed the appeal and ordered the appellants, pursuant to s. 31 (1) of the Licensing (Consolidation) Act, 1910, to pay

(1) Licensing (Consolidation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 31, sub-s. 1: "Where an appeal is dismissed . . . . the court of quarter sessions shall order the appellant to pay to the justices against whose decision he has appealed . . . . such sum by way of costs as is in the opinion of the court sufficient to indemnify those justices from all costs and charges whatsoever to which they have been put in consequence of his having served notice of his intention to appeal."

Sect. 32, sub-s. 1: "Where an appeal under this Act . . . . is dismissed . . . . and the licensing justices whose decision is appealed against cannot recover the costs incurred by them from any other person, the court of quarter sessions shall order the treasurer of the county in which the licensing district for which the licensing justices act is situated, ... to pay to the justices such sum as in the opinion of the court is suffi-

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85*l.* 1*s.* 2*d.* costs, an amount which "is in their opinion sufficient to indemnify the licensing justices from all costs charges and expenses whatsoever to which they may have been put in consequence of their having served upon them notice of the intention of . . . ." Walker and the owners "to appeal."

On August 8, 1917, the licensing justices' costs were taxed out of sessions. On the taxation the clerk of the peace allowed the licensing justices a special fee of 15 guineas to leading counsel and 10 guineas on the brief, thus taxing off 10*l.* 15*s.* from the 40*l.* 7*s.* actually paid to him by the licensing justices; and upon an application made upon behalf of the licensing justices to the Michaelmas quarter sessions for an order under s. 32 of the Licensing (Consolidation) Act, 1910, for payment to them by the treasurer of the city of Sheffield of the 10*l.* 15*s.* the Court of quarter sessions refused to make the order upon the grounds (1.) that the clerk of the peace had rightly exercised his discretion in disallowing on taxation the portion of the special fee paid to leading counsel; (2.) that when costs ordered to be paid to justices by way of indemnity pursuant to s. 31, sub-s. 1, of the Act of 1910 have been duly taxed, and in the case of taxation by consent out of sessions have been ascertained by means of such taxation, items disallowed on the taxation are not costs which the justices cannot recover from any other person within the meaning of s. 32, sub-s. 1, of the Act, and that in those circumstances the justices were not entitled to an order under s. 32, sub-s. 1, for payment of items so disallowed.

The rule was then obtained by the licensing justices upon the ground that the Court of quarter sessions was bound in law to make the order and had no jurisdiction to refuse it.

Lowenthal, for the respondents, the West Riding Justices, showed cause. The respondents, being of opinion that the clerk of the peace rightly exercised his discretion in taxing the costs allowable by way of indemnity to the licensing justices under s. 31, sub-s. 1,

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cient to indemnify them from all costs and charges whatsoever to which they may have been put, and that treasurer is hereby authorised to pay the sum so ordered to be paid, and any sum so paid shall be allowed to him in his accounts."

of the Licensing (Consolidation) Act, 1910, were right in refusing to order the 10*l.* 15*s.* to be paid to the applicants by the treasurer of the city of Sheffield. The 10*l.* 15*s.* was disallowed by the clerk of the peace as costs improperly incurred by the applicants. It is clear from *Reg.* v. *Winder* (1) that only costs properly incurred can under s. 32, sub-s. 1, of the Act of 1910 be ordered by the respondents to be paid by the treasurer of the city of Sheffield to the applicants. This application is in substance an appeal from the Court of quarter sessions. The clerk of the peace by consent of the parties taxed the costs out of sessions and ascertained that the special fee paid by the applicants to leading counsel on the appeal was too high by the sum of 10*l.* 15*s.* That sum he therefore disallowed as having been improperly incurred. Sects. 31 and 32 each relate to costs properly incurred and only to those costs. Therefore the 10*l.* 15*s.* ought not to be recovered by the applicants under s. 32. Sects. 31 and 32 alike refer to the same indemnity.

Cecil Whiteley, for the applicants, the licensing justices, in support of the rule. The discretion the Court of quarter sessions has to exercise under s. 31, sub-s. 1, of the Licensing (Consolidation) Act, 1910, in determining what costs are payable to the licensing justices by way of indemnity as between the licensing justices and an unsuccessful appellant is not the same as the discretion they exercise under s. 32, sub-s. 1, in determining what costs ought to be paid to the licensing justices out of the county or borough fund. The meaning of s. 32 is that the licensing justices are to have a complete indemnity against costs, and the fact that a taxation has taken place under s. 31 is immaterial. It may be proper that an unsuccessful appellant should not have to pay a large sum to the licensing justices, but that the licensing justices should still be entitled to a complete indemnity out of the borough or county fund for the costs they have been put to. In *Rex* v. *Salford Hundred Justices* (2) Lord Alverstone C.J. said: "It seems to me that the combined effect of s. 29 of the Alehouse Act, 1828, and s. 20 of the Licensing Act, 1902, which have been repealed, is now to be found in ss. 31 and 32 of the Act of 1910. The effect of those sections is to give the licensing justices a complete indemnity." He added that "the language of s. 32 of the Act of 1910 is very wide indeed, 'all costs

(1) [1900] 2 Q. B. 666. (2) [1912] 2 K. B. 567, 574, 576.

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and charges whatsoever to which they may have been put.' Those words might include certain expenses which the justices may have incurred in preparing for the appeal which would not perhaps be strictly costs in the appeal." Licensing justices are performing public duties, and are therefore in a position different from that of an ordinary private litigant. They ought to be completely indemnified against all costs, unless indeed they can be said to have been unreasonably incurred as against the treasurer of the city of Sheffield. The Court of quarter sessions has in effect made the licensing justices pay costs. In no event have they jurisdiction to do that: *Reg.* v. *Staffordshire Justices* (1); *Reg.* v. *London Justices.* (2) They did not apply their minds to the question whether the 10*l.* 15*s.* was unreasonably incurred as against the county fund, and they have not therefore exercised their discretion under s. 32, sub-s. 1, of the Act of 1910.

THE EARL OF READING C.J. The question we have to decide is whether the applicants, the licensing justices, are entitled under s. 32, sub-s. 1, of the Licensing (Consolidation) Act, 1910, to be paid by the treasurer of the city and county borough of Sheffield an amount of 10*l.* 15*s.*, being a portion of counsel's fees paid by the applicants in an appeal to the West Riding Quarter Sessions against a decision of the applicants refusing the renewal of a licence. If the order made on taxation by the clerk of the peace stands, the licensing justices will be 10*l.* 15*s.* out of pocket in respect of a matter which they were conducting gratuitously in the public interest and merely from a sense of public duty. In my opinion the question which we have to determine is one of considerable importance in these matters, inasmuch as we must decide whether or not the view contended for on behalf of the licensing justices is right or wrong—namely, whether, notwithstanding that they cannot recover under s. 31, sub-s. 1, the 10*l.* 15*s.* from the licensee and owners of the public-house, who were the appellants at quarter sessions, they can obtain it out of the county fund under s. 32, sub-s. 1. That contention involves the proposition that on the same order of the Court of quarter sessions the amount allowed by the taxing authority of quarter sessions as costs of an appeal when the money is to be paid

(1) [1898] 2 Q. B. 231. (2) (1898) 62 J. P. 517.

by an appellant may differ from the amount allowed when it is to be paid out of the county fund. The appellant was ordered under s. 31, sub-s. 1, to pay the costs in the widest form of order for payment of costs known to the law. The order is sometimes termed an order for payment of costs as between solicitor and own client, which is a more extensive order than one as between solicitor and client. Therefore, the Court of quarter sessions ordered the costs to be taxed under s. 31, sub-s. 1, upon the basis that the amount was to be paid by the appellants to the licensing justices which the solicitor for the licensing justices could have recovered for them on a taxation as between solicitor and own client. That means, shortly, costs properly incurred by the licensing justices in defending the appeal.

It is not for this Court to decide whether or not we should have arrived under s. 31 at the same conclusion as the clerk of the peace. I desire to make it quite plain that I am expressing no opinion upon that point, and certainly I am not saying that I should have come to the same conclusion. The complaint in the present case is not against the order of the clerk of the peace, because there is no appeal against his decision. An application was made to the Court of quarter sessions by the licensing justices under s. 32, sub-s. 1, for an order that the treasurer of the city of Sheffield should pay the 10*l.* 15*s.* to them upon the ground that there was power in the Court of quarter sessions to order the payment of that sum which, as it had been disallowed by the clerk of the peace, was "costs" which the justices could not "recover . . . . from any other person." Under s. 32, sub-s. 1, the order which the Court of quarter sessions can make is, so far as material, in exactly the same words as the order which can be made under s. 31, and therefore it is an order that the costs properly incurred be paid to the licensing justices on a taxation as between solicitor and own client. Therefore exactly the same order would have to be made under s. 32 as would be made under s. 31, and the same principle would have to be applied to the taxation. In the present case there are exactly the same circumstances under s. 32 as under s. 31, and the only possible distinction to be drawn is that under s. 32 the amount would come out of the county fund, whereas under s. 31 it would come out of the appellants' pocket. In my judgment the fact that the money is to come out of a public fund is no justification for allowing it as costs when

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it would not have been allowed under exactly the same order to be paid out of the pocket of the private individual. It is quite true that s. 32, sub-s. 1, was enacted for the purpose of giving the licensing justices a very full indemnity for expenses they had incurred out of the county fund, but the test both under s. 31 and s. 32 is the same. The costs must be properly incurred, and there is nothing in s. 32 which would justify the allowance of costs to the licensing justices which were not properly incurred. Indeed, it has not been contended on behalf of the licensing justices that such costs ought to be allowed. The contention on their behalf is that in considering whether costs are properly incurred it is permissible, notwithstanding that they have been disallowed as against an appellant, to allow them out of the county fund because it is a public fund and the justices are performing a public duty. The answer is that the same reason led to the enactment of s. 31 and s. 32 with regard to costs properly incurred by the licensing justices. An ordinary individual who is a litigant never obtains such an order for costs. The Court does not know and never recognizes such an order. It is sometimes made by agreement between the parties, but no Court ever orders a litigant to pay the costs to the other party as between solicitor and own client, unless there are such special circumstances as a statutory enactment. In the present case it is by reason of the statutory enactment that the licensing justices, being in this exceptional position, and having taken upon themselves the burden of the public duty, are entitled to be recouped the whole of the money which they have properly disbursed in the discharge of that public duty. The clerk of the peace has held that the 10*l.* 15*s.* was not a sum properly incurred upon the ground that to that extent the special fee was unreasonable. If we referred back to the Court of quarter sessions for consideration the question whether they would allow this sum, it would again be the clerk of the peace who would have to determine the amount, and on the same order, i.e. to tax as between solicitor and own client, and I cannot conceive that he would come to a different conclusion in applying the same principle to the same facts merely because the money claimed would come out of the public fund. For these reasons I come to the conclusion that this rule for a mandamus must be discharged.

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I only desire to add that we are not deciding that there may not be circumstances in which licensing justices may be entitled to recover some costs which they could not possibly recover upon an order that the costs of an appeal should be paid. I express no opinion on that point. Lord Alverstone C.J. in *Rex* v. *Salford Hundred Justices* (1) expressed an opinion, but I do not think that the point arises for our decision, and I propose to leave it open, merely observing that, as at present advised, I can conceive circumstances which would entitle them to obtain some costs under s. 32 which could not be recovered under s. 31. But they could not, in my opinion, be such costs as are at present the subject of consideration.

A. T. LAWRENCE J. I have very reluctantly come to the same conclusion. I have been compelled to do so because I cannot see any difference in the circumstances between the taxation under s. 31 and s. 32 in this particular case. There may be in other cases differences in the circumstances. But in this particular case it seems to me that if this rule were made absolute it would be in effect a direction to the justices to apply, or to have applied by their officer a different principle of taxation as against public moneys of the county and as against an appellant. I do not feel that it is possible to hold that that decision ought to be arrived at by this Court. I am not at all satisfied with the taxation that took place, but that is a matter with which this Court has nothing to do, and I agree that this rule should be discharged.

SHEARMAN J. I am of the same opinion. Before 1910 the justices' right to costs in licensing matters, when they became parties to licensing disputes, rested on two sections in different statutes, namely, s. 29 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), and s. 20 of the Licensing Act, 1902 (2 Edw. 7, c. 28). Sects. 31 and 32 of the Licensing Act, 1910, extended the provisions of the earlier Acts in the form of a code showing the extent to which the Legislature thought that justices in the performance of their public duties should be protected. The code is very short and clear. The principle upon which the Court of quarter sessions acts in making

(1) [1912] 2 K. B. 567, 574, 576.

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an order for payment of costs by an appellant under s. 31 is that of looking upon the licensing justices as men who give their time without payment and who ought to be indemnified. That is to say, in a taxation under s. 31 the appellant who has failed ought to be made to pay such costs as are a proper indemnity to the licensing justices and as shall prevent them being out of pocket. Of course that order is subject to the limitation that no one is entitled to be extravagant either against a litigant who is opposed to him, or in respect to public funds. But, subject only to that limitation, s. 31 means that the costs shall be taxed on the basis that the licensing justices shall be recouped and shall not be out of pocket to the extent of any sum which they have expended within the bounds of reason and prudence. That is the widest scale known to the law. But when they cannot obtain payment of those costs by the appellant there is the extension made in the Act of 1910 which is included in s. 32, and I think that extension applies mainly to cases where the security given by or the credit of the appellant fails. There is then given a power to resort to the public fund. Sect. 32 contains words with regard to the indemnity which is to come out of a public fund identical with those in s. 31 with regard to the indemnity to be paid by the appellant, and it seems quite plain that when the taxing officer is dealing with a proper expense incurred in meeting the appeal—a regular step in the appeal—he ought to tax on the widest possible scale under s. 31, and that he cannot possibly tax on any wider scale than under that section. If the words of s. 32 show that there is a right to a second taxation, I think it is merely a technical right so far as any matter is dealt with which has previously been dealt with by the taxing officer in exercising his discretion under s. 31. I think it would be most mischievous to hold that if certain items allowable as against the appellant are reduced in a taxation under s. 31 the licensing justices have a right to again go before the Court of quarter sessions and say in effect: "We want all these items reconsidered as against the public fund." The practice would immediately grow up of bringing before the justices in quarter sessions every item which had been taxed against a party. I cannot think that anything of that kind was intended. In my judgment when the costs have been taxed under s. 31 it would be unreasonable for this Court to order

them to be taxed again under s. 32. I am therefore of opinion that the rule should be discharged.

Whiteley asked that an order might be made under s. 32 of the Act of 1910 for the payment by the treasurer of the city of Sheffield to the licensing justices of the costs incurred by them in making this application.

THE EARL OF READING C.J. What jurisdiction has this Court to make the order?

Whiteley. It was done in *Reg.* v. *Staffordshire Justices.* (1)

THE EARL OF READING C.J. That is not a strong case. The point was not argued, and I do not think the Court had any jurisdiction to make the order. There was also an intimation by the Court of quarter sessions that that Court was willing to include the costs of the certiorari and mandamus in their order of indemnity if the Divisional Court made the order that those costs should be included in the indemnity order. That was a different case.

Whiteley. The licensing justices ought not to pay the costs of the justices of the Court of quarter sessions.

THE EARL OF READING C.J. We do not interfere with any order the Court of quarter sessions may make, but we cannot make the order asked for. The rule must be discharged with costs.

Rule discharged.

Solicitors for applicants: *Warwick Williams & Co., for W. Vibart Dixon, Sheffield.*

Solicitors for respondents: *Church, Rendell, Bird & Co., for F. B. Dingle, Sheffield.*

(1) 62 J. P. 741.

J. E. A.

C. A.
1917
Oct. 25, 26.

[IN THE COURT OF APPEAL.]

COUNTESS OF WARWICK STEAMSHIP COMPANY *v.* LE NICKEL SCCIETE ANONYME.

ANGLO-NORTHERN TRADING COMPANY, LIMITED *v.* EMLYN JONES & WILLIAMS.

Ship—Time Charterparty—Hire—Requisition of Vessel by Admiralty—Frustration of Adventure.

The doctrine of commercial frustration is applicable to time charterparties.

Circumstances under which it was held that the doctrine of commercial frustration applied in consequence of the requisition by the Admiralty of vessels subject to time charterparties.

Tamplin Steamship Co. v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397 discussed and followed.

Decision of Bailhache J. [1917] 2 K. B. 78 affirmed.

COUNTESS OF WARWICK STEAMSHIP COMPANY *v.* LE NICKEL SOCIETE ANONYME.

APPEAL from the decision of Sankey J. in an action tried without a jury.

The facts were as follows:—By a charterparty dated March 16, 1915, the plaintiffs let to the defendants and the defendants hired the steamship *South Pacific* for the term of about, but not less than, twelve calendar months from the day on which she was delivered to and placed at the disposal of the charterers; the hire was to be 4387*l.* per calendar month payable in advance in London, and was to continue from the time for commencing the charter until the redelivery of the steamship (unless lost) to the owners. Clause 17 provided that during the time lost from deficiency of men or stores or accident preventing the working of the steamer the hire should cease; clause 18, that if the steamship should be lost the hire should cease from the date of her loss; and clause 20, that the act of God, perils of the sea and restraints of princes, rulers and peoples were excepted. The steamer was placed at the disposal of the charterers on March 29, 1915, and on October 6, 1915, having arrived on the completion of a voyage at Glasgow, was requisitioned by the

Admiralty, in whose service she still was. The charterers paid the hire up to October 30, 1915, but had since declined to pay it. The present action was brought by the shipowners against the charterers to recover the balance of hire claimed to be due under the charterparty. Sankey J. held that the doctrine of frustration of a commercial adventure applied to a time charterparty, and, further, that there had in fact been in the present case a frustration of the adventure; he therefore gave judgment for the defendants. The plaintiffs appealed.

MacKinnon, K.C., and *R. A. Wright, K.C.*, for the plaintiffs, contended that the doctrine of frustration of the adventure had no application to a time charterparty, and, further, that, if it had, there had been in fact no frustration of the adventure in the present case. [They cited *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.* (1), *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (2), *Embiricos* v. *Reid & Co.* (3), *Watts, Watts & Co.* v. *Mitsui & Co.* (4), and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (5)]

Leck, K.C., and *Barrington Ward*, for the defendants, were not called upon to argue.

ANGLO-NORTHERN TRADING COMPANY *v.* EMLYN JONES & WILLIAMS.

APPEAL from the judgment of Bailhache J. upon an award stated by an arbitrator in the form of a special case.

By a charterparty in the Baltic and White Sea Conference form dated October 2, 1915, the Anglo-Northern Trading Company, Limited (hereinafter called the chartered owners), agreed to let, and Emlyn Jones & Williams (hereinafter called the charterers) agreed to hire, the steamer *Lowdale* for a term of about eleven or twelve calendar months (say from date of delivery till September 30 or October 30, 1916) at 363*l.* 5*s.* per calendar month, commencing from the time the steamer was placed at the charterers' disposal. The payment of hire was to be made in London monthly in advance. The charterparty provided by clause 12 that in the event of loss of time

(1) [1917] 1 K. B. 222.
(2) (1917) 33 Times L. R. 390.
(3) [1914] 3 K. B. 45.
(4) [1917] A. C. 227, 245.
(5) [1916] 2 A. C. 397.

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from deficiency of men or owners' stores, breakdown of machinery or damage to hull or other accident preventing the working of the steamer for more than twenty-four consecutive hours, hire should cease until she was again in an efficient state to resume her service, and it contained an exception clause which included, inter alia, restraint of princes, but there was no provision for cessation of hire in respect of any interruption of the services of the steamer due to that exception. The steamer (unless lost) was to be redelivered on the expiration of the charterparty. By a supplemental clause it was provided that any time occupied in the survey of the steamer was to be added to or deducted from the above periods at the charterers' option.

The steamer was delivered to the charterers on October 28, 1915, when hire commenced, but it ceased to be payable for two periods while the steamer was undergoing survey in November-December, 1915, and in May, 1916. In respect of those periods the charterparty was admittedly extended by the charterers exercising the option given them to do so. On July 26, 1916, the steamer was requisitioned by the Admiralty, and continued under that requisition until after the expiration of the period covered by the charterparty, the rate of hire payable by the Admiralty being 1529*l.* 10*s.* per month. At the time of requisitioning the steamer no information was given by the Admiralty of the probable duration of the requisition. At that time hire had been paid in advance by the charterers for the period expiring at 12 noon on July 28, 1916, but no subsequent payment of hire was made by the charterers. If the extended period of time occupied in the survey of the steamer was added, the charterparty would terminate at 2 A.M. on November 19, 1916. No formal redelivery of the steamer was ever made by the charterers, and at 2 A.M. on November 19, 1916, the steamer was still under requisition to the Admiralty. No payment of hire had been made by the Admiralty to the charterers, and there was no evidence before the arbitrator as to to whom, if at all, it had been paid, but presumably it had been, or would be, paid to the owners. The chartered owners claimed against the charterers hire from July 28, 1916, to 2 A.M. on November 19, 1916, amounting (after giving credit for the hire, if and when received from the Admiralty) to 7782*l.* 6*s.* 4*d.*

It was contended for the chartered owners that they were entitled

to hire for the whole period of the charterparty as extended, that it was the charterers' duty to collect from the Admiralty the hire payable under the requisition, and that the requisition did not put an end to or affect the rights of either party under the charterparty.

It was contended for the charterers that the Admiralty requisition put an end to the charterparty.

The arbitrator decided, subject to the opinion of the Court, that the Admiralty requisition did not put an end to the charterparty, and that the chartered owners were entitled to be paid hire until 2 A.M. on November 19, 1916, giving credit for the hire payable by the Admiralty. He therefore awarded that the charterers should pay to the chartered owners 7782*l.* 6*s.* 4*d.* If his award was correct in point of law, it was to stand; if, however, the Court should be of opinion that the charterparty was determined by the Admiralty requisition, he awarded that the chartered owners should repay to the charterers 302*l.* 12*s.* 1*d.*, being the hire paid in advance for the period from July 26, 1916, when the steamer was requisitioned, until noon on July 28, 1916.

Bailhache J. held that there was a frustration of the adventure by the requisition, and that therefore the charterers were not liable for the hire after the date of the requisition.

The chartered owners appealed.

Inskip, K.C., and *Raeburn*, for the chartered owners. The arguments and cases cited were the same as in the Court below.

Leck, K.C., and *Le Quesne*, for the charterers, were only called upon as to the findings of the arbitrator.

PICKFORD L.J. In my opinion the question for our decision is governed by authority by which we are bound. We have had a long argument as to whether the law should be as it is declared to be, but such an argument is quite irrelevant and it is impossible for us to express any opinion of our own on the matter. The charterparty is a time charter. Distinctions have been suggested between different kinds of time charters—between a time charter which specifies a definite voyage and one which does not; I use the expression in the ordinary sense of a time charter not specifying a definite voyage and described in ordinary language as a time charter. This time charter

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includes the exception of "restraint of princes." It is, in all respects relevant to the present case, the same charter as was discussed by this Court and by the House of Lords in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) The question of principle raised in the present case is, on a charter of that kind, can either party have recourse to the doctrine of frustration of the adventure as laid down in the old case of *Jackson* v. *Union Marine Insurance Co.* (2), or, as it is put by counsel for the appellants (though I think it is merely a difference in language), can you in this charter imply a condition—I do not say a condition subsequent—that the charter is only to be in existence so long as something has not happened which will put an end to the purpose of the parties entering into it? Putting it in other words, does it come within the doctrine laid down by Lord Haldane early in his judgment in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3) in these words: "When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charterparty under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a

(1) [1916] 2 A. C. 397. (2) (1874) L. R. 10 C. P. 125.
(3) [1916] 2 A. C. 406.

character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation"? In my opinion the judgment of the majority of the House of Lords decides that that principle does apply in such a case. There is no dispute that Lord Atkinson's and Lord Haldane's judgments cover the point exactly; what is disputed is whether Lord Loreburn's judgment does so. In my opinion there is no doubt that it does. Lord Loreburn (1), after discussing the cases of *Geipel* v. *Smith* (2) and *Jackson* v. *Union Marine Insurance Co.* (3) and the doctrine which those cases establish, says that he applies the principle to the present case, which principle is expressed in the words of Lord Haldane which I have already quoted.

It may be that Lord Loreburn differs from Lord Atkinson and Lord Haldane as to the person on whom lay the onus of proof. He may have thought—I do not say that he did think—that a requisition such as took place in this case was prima facie not such a disturbance as to bring the doctrine into play, and that they thought it was. In the one case the onus would be on the person who said it was a disturbance, and in the other case the onus would be on the person who said it was not. I do not think that that matters when what you are considering is whether all the three learned Lords held that the principle did apply. I clearly think they did, and I think it is immaterial if they differed as to the onus of the proof of the facts necessary to establish it.

My opinion is fortified by what was said by Bailhache J. in the second case we are now considering, *Anglo-Northern Trading Co.* v. *Emlyn Jones and Williams* (4), where he says: "The authorities upon the point are difficult to reconcile, and there is such conflict of opinion on the subject among lawyers and commercial men that I reserved my judgment in the hope that I might be able to extract from the decided cases some definite rules which might serve as a guide to shipowners and time charterers, who are much perplexed to know what their respective rights are in such a case as the present, a case now of constant occurrence. I have found the task a difficult one, but with the diffidence which befits a judge of first

(1) [1916] 2 A. C. 404.
(2) (1872) L. R. 7 Q. B. 404.
(3) L. R. 10 C. P. 125.
(4) [1917] 2 K. B. 78, 83.

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instance, especially one whose opinion has been overruled, I venture to suggest that the law at present stands thus: (1.) The doctrine of commercial frustration is applicable to a time charterparty: see per Lords Loreburn, Haldane, and Atkinson in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.*" (1) The learned judge goes on to add another authority, which leads him to the same conclusion; I pass that by for the present. Then he continues: "(2.) The doctrine does not apply when the time charterer has the use of the vessel for some purpose for which he is under the terms of the time charterparty entitled to use her, even though that purpose is not the particular purpose for which he desires to use her. . . . ." That is a point which it is not necessary to consider in this case. "(3.) It follows that the doctrine does not apply unless the owner is unable to give the time charterer the use of the vessel for any purpose whatever within the scope of the charterparty. (4.) Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charterparty depends upon the circumstances. The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty. (5.) This raises another question, namely, when is the party desirous of relying upon the doctrine of frustration in a position to claim his right so to do? If he does so as soon as the event happens which in his view gives him the right, its duration must be a matter of estimate, depending chiefly upon the nature of the event. The particular event with which I am concerned in this case is a requisition of the vessel by the Admiralty for an undefined period." I think that is a very careful, clear, and correct summary of the position of the authorities when the learned judge gave his judgment, and also of their position at the present time. If it be, it is clear that the first point is determined by authority, and it is no use considering whether we agree with it or not—I am not suggesting that I do not, but it is immaterial—and that is all I propose to say upon that matter. We are bound by authority.

There is another question, which is purely one of fact: In this case has it been shown that there has been such an interference that the objects of the parties in entering into the charterparty have been

(1) [1916] 2 A. C. 397.

frustrated? Sankey J. held that they had been frustrated, and I see no reason at all for differing from the conclusion at which he arrived. I assume that the point of time (and in this I follow Sankey J.) that has to be looked at is the time when the requisition was made. It may be a question whether the Court must decide that point upon evidence or whether it is entitled to take judicial notice of public events such as everybody knows of. But whichever test you apply, it seems to me that the judgment of Sankey J. is entirely right. He had the evidence of one witness, a gentleman of experience in such matters, who said that he was a shipbroker, and that during the war he had chartered many steamers; that in October, 1915, vessels were very freely requisitioned by the Government, and that the general expectation of the period of detention at that time was that it was a question of good-bye to them; that there was no expectation of return; that it was thought they would be returned at the end of the war; that the owners very seldom got the vessel back; and that there was no reasonable anticipation of getting the vessel back in five months, which was the unexpired portion of the charter. He was cross-examined as to some ships that had been returned, and said his experience was generally with tramp steamers. This was a tramp steamer, though a good one.

If the learned judge confined himself to the evidence, there was only one thing he could possibly decide. It was proved that at that time everybody anticipated that there was no possibility of the return of a ship except in the very improbable event that it was found to be of no use when requisitioned, as had happened in some cases. On the other hand, if the Court has to consider public events which were occurring—at that time the war had lasted since August, 1914, and there was certainly no immediate prospect of its coming to an end within five months, and probably nobody would have said there was the slightest possibility of it coming to an end within such a time. We were then engaged in a campaign in France, another at Gallipoli, another in Mesopotamia and another in Africa. With regard to none of these was there a possibility that it would come to an end in a short time. If they came to an end by evacuation, in each case there would be the same need of transport and shipping for taking horses, &c., away that there would be for sending reinforcements; and I should have thought, if we may look to these

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matters, which everybody is supposed to know except the Court, the conclusion we should come to is the same.

I must not overlook one fact. It is alleged that the charterers at one time said it was quite possible that the ship would be given back within five months. I attach no importance to that, because I find that a different position was taken up very shortly after, and no doubt the anticipation of the two letters was influenced by the question of who would benefit. I have come to the conclusion that the finding of Sankey J. was amply justified by the evidence before him and by the facts. If it is admissible (I do not say that it is) to look at subsequent events to see if they throw any light as to whether that was likely to be the anticipation of the state of affairs at the time, I think it is the fact that even now the ship is still under requisition. If it is admissible to look at subsequent events, then still more is the conclusion of Sankey J. justified.

The same considerations dispose of the second appeal, that of *Anglo-Northern Trading Co.* v. *Emlyn Jones and Williams*, with one exception. It has been argued that the special case precludes the Court from a consideration of the matter for this reason. The doctrine of frustration has of course to be applied as a basis of fact. The fact is, put shortly, that the anticipated duration of the detention of the ship must be such as to defeat the common object of the parties in the matter; and it is said that the arbitrator, a gentleman of very great experience and knowledge in these matters who has made very many awards, has found that these facts did not exist in this case. If he had, I should say at once that this Court had no right to interfere. But, looking at his award, I do not think he has found anything of the sort. I am sure he has not found, and I do not believe he intended to find, that conclusion of fact. I think that his intention was to find the date of the requisition, to find the length of the unexpired portion of the time charter, to find the duration (as he knew it at the time) of the requisition, and then to say, "What inference ought I to draw from these facts? I do draw the inference that the requisition did not put an end to the charter. I want to know whether I was right in drawing that inference." Having stated the circumstances I have mentioned, he says: "I hold and decide (subject to the opinion of the Court) as follows: (1.) That the Admiralty requisition did not put an end to the charter-

party between the chartered owners and the charterers." He further says: "I therefore award that the charterers do pay to the chartered owners the sum of 7782*l.* 6*s.* 5*d.* and that the charterers do further pay the costs of this award. The question for the opinion of the Court is whether my award is correct in point of law. If it be correct, my award is to stand. If, however, the Court shall be of opinion that the said charterparty between the chartered owners and the charterers was determined when the steamer was requisitioned by the Admiralty, then I award . . . ." a certain amount to be repaid by the owners. I think he meant to say: "I have stated the unexpired period of the charter; I have stated its duration at the date of the requisition; I have stated the duration of the requisition; and I want to know whether I ought from that to draw the inference that this charterparty was at an end." On that state of facts I think that the Courts have said the charterparty was at an end, and therefore I think the judgment of Bailhache J. must be affirmed in the one case the same as that of Sankey J. in the other.

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BANKES L.J. and SARGANT J. concurred.

Appeals dismissed.

Solicitors for plaintiffs in *Countess of Warwick Steamship Company* v. *Le Nickel Société Anonyme: Holman, Fenwick & Willan.*

Solicitors for defendants in *Countess of Warwick Steamship Company* v. *Le Nickel Société Anonyme: Lawrence Jones & Co.*

Solicitors for chartered owners in *Anglo-Northern Trading Company* v. *Emlyn Jones & Williams: Winn Jones & Co.*

Solicitors for charterers in *Anglo-Northern Trading Company* v. *Emlyn Jones & Williams: W. A. Crump & Son.*

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[IN THE COURT OF APPEAL.]

STEVENS (SURVEYOR OF TAXES) *v.* E. BOUSTEAD & CO.

Revenue—Income Tax—Deductions—Annual Value of Business Premises situated Abroad—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100 ; *Sched. D, Case I., rr.* 1, 3 ; *Cases I. and II., rr.* 1, 2—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 9.

The respondents, who carried on business in London and at Singapore and Penang, claimed to deduct as an expense in arriving at the amount of their profits or gains assessable to income tax under Sched. D the annual value of the premises owned and occupied by them at Singapore and Penang for the purposes of their business :—

Held, that the annual value of the premises in question was a proper deduction in arriving at the respondents' profits or gains assessable to income tax under Sched. D, and that this was not affected by the fact that the premises being situated abroad were not assessable to income tax under Sched. A.

Russell v. *Town and County Bank* (1888) 13 App. Cas. 418 applied. Decision of Atkin J. [1916] 2 K.B. 560 affirmed.

APPEAL from a decision of Atkin J. (reported [1916] 2 K. B. 560) on a case stated by the Commissioners for General Purposes of the Income Tax Acts for the City of London.

At a meeting of the Commissioners held at the Guildhall on November 12, 1914, the respondents, E. Boustead & Co., of 3, Lloyd's Avenue, appealed against an additional first assessment of 1084*l.* under Sched. D to the Income Tax Act, 1853, made on them by the Commissioners on August 12, 1913, for the financial year ending April 5, 1913.

At the hearing the following facts were proved or admitted :—

The respondents carried on business at Singapore and Penang and other places in the East, and also in the city of London. They claimed to deduct as an expense the annual value of the business premises which they owned and occupied at Singapore and at Penang, where part of the profits were made on which the assessment was based.

It was not disputed that the amount of the City rating valuation of the business premises occupied by the respondents in Singapore

and Penang was correctly stated at 1084*l.* (1), and the payment of the rates and taxes was admitted by the surveyor of taxes as a proper deduction as an expense in the respondents' profit and loss account, and for the purposes of the present case it was not disputed that 1084*l.* was the annual value of the premises. It was not disputed by the surveyor of taxes that if the premises had been occupied at such rental of 1084*l.* in the United Kingdom the amount of such rent would have been allowed as a deduction or expense, but it was contended that as there was no Sched. A duty under the Income Tax Acts referring to foreign companies or imposed in Singapore or Penang, the respondents should not be allowed any deduction in respect of the rental value of the premises they occupied for the purposes of their business.

A partner in the respondents' firm gave evidence that it would have been impossible to have made any profit in their Singapore or Penang business if they had not had premises of the value of the amount charged as a deduction in the profit and loss account; and he claimed, therefore, that the annual value was a preliminary expense essential to the making of any profit chargeable under the Act. He also stated in reference to the deduction that the same was not a deduction from profits, but was a necessary preliminary expense for the making of any profits; that the whole of the premises charged for were built and used solely for the firm's business and were structurally divided from any other premises and were essential for the purpose of earning the profits charged with income tax and for no other purpose.

Counsel for the surveyor of taxes claimed to strike out from the profit and loss account the amount so charged by way of deduction as an expense, and contended that on the construction of the Income Tax Act, 1842, the deduction should not be allowed, as the rules prohibit all deductions except those expressly enumerated in the Act, and as the deduction was not enumerated the respondents could not claim the allowance thereof.

It was also claimed that as by s. 9 of the Finance Act, 1898, it is enacted that "Where in estimating the amount of annual profits

(1) It was stated in the course of the argument that the annual value of the premises should have been stated at 3254*l.*, but for the purposes of this report the precise figure is immaterial.

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or gains arising or accruing from any profession, trade . . . . and chargeable to income tax under Schedule D of the Income Tax Act, 1853, any sum is deducted on account of the annual value of the premises used for the purpose of such profession, trade . . . . the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of income tax under Schedule A to the said Act, as reduced for the purpose of collection under section 35 of the Finance Act, 1894," and as it was not disputed that there was no assessment to income tax under Schedule A applicable to or in force at Singapore and Penang where the business was carried on, no claim to any deduction could arise.

Counsel for the respondents contended to the contrary.

The Commissioners found as facts :—

(1.) That the premises were used exclusively for business purposes, and that their annual value was at least the amount claimed as a deduction.

(2.) That the annual value of the premises was an expenditure necessary for earning the receipts for the year in question.

(3.) That the respondents in using the premises put themselves to the expense of their annual value for the purposes of their trade, and that the said annual value was money wholly and exclusively expended for the purposes of their trade.

The Commissioners discharged the assessment, but stated this case for the opinion of the Court.

Atkin J. dismissed the appeal from the Commissioners. He held that the annual value of the respondents' premises which they owned and occupied at Singapore and Penang was a proper deduction in arriving at their profits or gains assessable to income tax under Sched. D, and that this was not affected by the fact that those premises being situated abroad were not assessable to income tax under Sched. A.

The appellant appealed. The appeal was heard on December 11, 12, 1917.

Sir Gordon Hewart, S.-G., and *T. H. Parr*, for the appellant. It is submitted that where a taxpayer is the owner of the premises in which he carries on his trade, and for which, therefore, he pays no rent, the annual value of the premises is not a disbursement or

expense "wholly and exclusively laid out or expended for the purposes of such trade" within the meaning of r. 1 of the rules applying to the First and Second Cases in Sched. D of the Income Tax Act, 1842, and therefore that such annual value cannot be deducted. The premises in question form part of the respondents' capital, and for that reason the deduction ought not to be allowed. It is true that if the premises had been situated in this country their annual value might properly have been deducted under r. 2 of the rules applying to the First and Second Cases: *Russell* v. *Town and County Bank* (1); *Usher's Wiltshire Brewery, Ld.* v. *Bruce*. (2) The reason for allowing that deduction would appear to be that the premises would have already been taxed under Sched. A: *General Hydraulic Power Co.* v. *Hancock* (3); *Colquhoun* v. *Brooks*. (4) Here the premises being situate abroad are not subject to taxation under Sched. A. The reason for allowing the deduction therefore does not apply. Rule 2 must, it is submitted, be read as limited to premises in the United Kingdom assessed to income tax under Sched. A. Further, regard must be had to s. 9 of the Finance Act, 1898, which provides that the sum deducted is not to exceed the amount of the assessment for the purpose of income tax under Sched. A. Inasmuch, therefore, as there has been no assessment of these premises under Sched. A, nothing can be deducted. [They also referred to *Liverpool and London and Globe Insurance Co.* v. *Bennett*. (5)]

Douglas Hogg, K.C., and *T. Mordaunt Snagge*, for the respondents, were not called upon.

SWINFEN EADY L.J. This is an appeal from Atkin J. upon a question with regard to income tax. The case is reported in [1916] 2 K. B. 560, where the facts are fully set out, and I need not, therefore, recapitulate them. The short point is whether the respondents, Messrs. E. Boustead & Co., before arriving at the amount of their profits and gains for the year in question on which they are to be taxed, are entitled to make a deduction in respect of the value of the lands, tenements, and hereditaments at Singapore and at Penang, that are occupied by them

(1) 13 App. Cas. 418.
(2) [1915] A. C. 433.
(3) [1914] 2 K. B. 21, 28, 29.
(4) (1889) 14 App. Cas. 493, 515.
(5) [1913] A. C. 610.

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exclusively for the purposes of their business. They are merchants carrying on business in the city of London and also in the East at Singapore and Penang, where they have houses which are occupied for the purposes of their business and in respect of which the annual value has been agreed between the parties at the sum of 3254*l.* The year in respect of which the present question arises is the year ending April 5, 1913, and for that year there was an additional first assessment of 3254*l.* made upon the firm, and it is against that additional first assessment that they appeal. The year in respect of which the question arises is material because it is anterior to the Finance Act of 1914, so that that Act has no application to the present case.

The respondents are charged under Sched. D, and by s. 100 of the Income Tax Act, 1842, the duties thereby granted, contained in the schedule marked D, are to be assessed and charged under rules which are to be deemed and construed to be part of the Act. In applying the rules contained in the schedule for the purpose of computing the duties to be charged in respect of any trade, manufacture, adventure, or concern the material rule is r. 2 of the "Rules applying to both the preceding Cases." That rule provides that "The computation of the duty to be charged in respect of any trade, manufacture, adventure, or concern, or any profession, whether carried on by any person singly or by any one or more persons jointly, or by any corporation, company, fraternity, or society, shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments, occupied for the purpose of such profession, trade, manufacture, adventure, or concern." That is a clear provision that in computing the duty there is to be excluded from the sum in respect of which duty is payable any profits or gains arising from hereditaments occupied for the purpose of trade.

If that were all, then it is clear that, according to the true construction of that rule, the respondents would be entitled to treat as an expense and deduct from their profits and gains the sum of 3254*l.*, which is the annual value of their business premises, and the gain arising from their occupation. But it is said that, these premises being situate out of the United Kingdom, that is not the true construction of the rule, and that you must read something into it and must understand it as being

only applicable to lands, tenements, or hereditaments in the United Kingdom assessed to income tax under Sched. A. Why? It is said that the rule is confined to such lands only as are previously taxed, and that it must have been intended to be applicable only to lands, tenements, or hereditaments previously taxed, and that as against the subject you are to read into r. 2 words so limiting it. In my opinion there is no ground for reading into the rule any such words. It is possible that the Legislature thought that as regards hereditaments within the United Kingdom the income tax had already been provided for under Sched. A, and that as regards any income derived from foreign possessions it would be within the Fifth Case and therefore be dealt with by that Case. But that is mere speculation. All one has to do is to interpret the language of r. 2, and it seems to me to be clear that that rule in terms excludes from any profits or gains that are to be taxed in respect of a trade or profession any profits or gains arising from lands, tenemants, or hereditaments occupied for the purpose of such trade or profession without any limitation as to where such lands, tenements, and hereditaments are situate.

Then it was said that you must have regard to the provisions of s. 9 of the Finance Act, 1898, which limits in certain cases the amount of the deduction to be made on account of the annual value of the premises. That section provides that "Where in estimating the amount of annual profits or gains arising or accruing from any profession, trade, employment, or vocation, and chargeable to income tax under Schedule D of the Income Tax Act, 1853, any sum is deducted on account of the annual value of the premises used for the purpose of such profession, trade, employment, or vocation, the sum so deducted shall not exceed the amount of the assessment of the premises for the purpose of income tax under Schedule A to the said Act, as reduced for the purpose of collection under section thirty-five of the Finance Act, 1894." In my opinion that section has no application to a case where there is no assessment under Sched. A of the Income Tax Act, and where the premises are not capable of assessment under that schedule. It amounts to this, that where there is an assessment under Sched. A, then the sum deducted is not to exceed the amount of the assessment under that schedule. For these reasons I am of opinion that the argument on behalf of the

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appellant is not well founded and that the respondents are entitled to deduct the sum in question.

Reference was made to the case of *Russell* v. *Town and County Bank* (1) and to the language there used by Lord Herschell. It is to be observed that in that case the attention of the Court was not drawn to r. 2 of the "Rules applying to both the preceding Cases," nor was it necessary for the purposes of that case, because the Commissioners there conceded that a proper deduction could be made for premises occupied for the purposes of the business. The point there was whether a certain part of the premises occupied by officials of the bank stood in the same position for the purpose of the deduction as the bank premises properly so called where the ordinary business of banking was carried on, and therefore it was not necessary for the purpose of that decision to refer to r. 2. But if any further reason for allowing the deduction were wanted it is supplied by the reasoning of Lord Herschell, which was quoted by Atkin J. and appears on p. 565 of the report in the Court below and which it is not necessary to read again.

For these reasons I am of opinion that the appeal fails and should be dismissed.

WARRINGTON L.J. I am of the same opinion. The case seems to me to be covered exactly by r. 2 of the "Rules applying to both the preceding Cases" read in connection with r. 1 thereof, as applied to the First Case of "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade." Rule 1, which applies to the First Case and also to the Second Case, which one may speak of as the Profession Case, provides that, "In estimating the balance of the profits or gains to be charged according to either of the First or Second Cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains"—for certain disbursements or expenses which it is not necessary to read—"nor for the rent or value of any dwelling house or domestic offices, or any part of such dwelling house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned . . . ." Then r. 2, which appears

(1) 13 App. Cas. 418.

to me to be supplementary to r. 1, provides that "The computation of the duty to be charged in respect of any trade, manufacture, adventure, or concern, or any profession . . . . shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such profession, trade, manufacture, adventure, or concern." Reading those two rules together, it appears to me that although under r. 1 it would as a matter of construction have been reasonably clear that the annual value of premises used for the purpose of such trade or concern would have been properly deducted, it is made abundantly clear by r. 2.

Secondly, I think that if for any reason it should be held that the deduction in question is not in terms allowed by any of the rules, then it ought on general principles to be allowed, using the words of Lord Herschell in *Russell* v. *Town and County Bank* (1), "because it is an essential element to be taken into account in ascertaining the amount of the balance of profits." The judgment of Lord FitzGerald in that case is to the same effect. It is true that there the general proposition affirmed by Lord Herschell and Lord FitzGerald was not disputed by the counsel who then appeared for the Crown, the question being not whether the annual value of the premises used for the purpose of the business should be allowed, but whether it could be said that the whole of the premises, including the manager's residence, were to be properly treated as used for the purpose of the business. But although it may not have been absolutely necessary for the decision of that case that Lord Herschell and Lord FitzGerald should have expressed their opinion in the way they did, their views are valuable, and I think I am justified in accepting them as a guide in the present case. If that be so, I can see no reason whatever why, as a matter of construction, one should either read into the rules or should introduce as a qualification of the general principles to which I have referred the condition that the annual value, the deduction of which would otherwise be allowed, must, in order to be allowed, be otherwise subject to taxation under the Act. There seems to me to be no reason whatever for reading that qualification into the rules or for introducing it into the general principle.

Then with regard to s. 9 of the Act of 1898, I think it is sufficient

(1) 13 App. Cas. 418, 425.

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to say that in this particular case there is no assessment under Sched. A, and therefore that section is not applicable.

SCRUTTON L.J. I am of the same opinion. The question which is to be decided here is this: Messrs. Boustead & Co. carry on a trade in the United Kingdom and in the East. At two places in the East where they carry on trade they own the premises in which they carry on business. When they are to be taxed upon the profits of their trade, is it allowable for them either not to include the profits from the premises they own in the gross profits of their trade, or, having ascertained the gross profits of their trade, to make a deduction therefrom in respect of the part apportionable to the fact that they own the premises in which the trade is carried on? When one comes to consider the statutes by which this question has to be determined one is struck, as every judge who has had to consider the matter has been struck, by their extreme incoherence. One has heard for some time that it is proposed to codify and amend these statutes so as to make them fairly intelligible, and one hopes that this long-delayed promise may be carried out with great advantage to all business men who have to consider the language of the statutes. By s. 2 of the Income Tax Act, 1853, the trade is to be taxed under Sched. D "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom . . . . from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere . . . ."; and to find out the profits of the trade you are sent to r. 1 of the First Case under s. 100 of the Act of 1842. By that rule the duty is to be computed "on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern." As has been repeatedly pointed out, the framers of the Act in the Cases in the schedule use the phrase "profits or gains" in at least two different senses; sometimes as meaning the balance of profits after deducting the expenses, and sometimes as meaning the whole of the gross profits before deducting the expenses, and a very careful consideration is always necessary in order to determine in which sense the draftsman is using the phrase at the particular moment. But r. 1 goes on to provide that the balance of profits and gains is to be

"assessed, charged, and paid without other deduction than is hereinafter allowed." One would expect from that language to find in some subsequent part of the Act of 1842 a series of deductions that are allowed. You will be disappointed if you look for any such provision in the Act. You will find not one but two very involved clauses which tell you what deductions are not allowed, from which it is said that by reason of the involved language of some of the exceptions that "a deduction is not to be allowed except," you can infer that certain deductions are allowed by the process of the double negative. As to whether those double negative deductions, as I may call them, are exclusive, or whether there are others, you are left in the dark as far as the language of the statute is concerned. You find, following r. 1, r. 3 of the First Case, which sets out a series of deductions that are not allowed. One of them is "nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern." But if you pass over several rules you find under the heading "Rules applying to both the preceding Cases," r. 1, which sets out a number of other deductions which are not allowed. Why the two sets of deductions which are expressed in different language should not have been comprised in the same rule it is impossible to understand. If one were left with those two sets of "deductions not allowed" alone, one would be in considerable difficulty in this case. To take a concrete instance as illustrating the difficulty one would be in—supposing that a single individual has premises worth 10,000*l.*, that he uses them for his trade and spends in the year 8000*l.* more in organizing the business and selling goods, and that at the end of the year he has sold his goods and has 10,000*l.* in hand and his premises. He is 2000*l.* better off than he was when he started the year. When he assesses the profits of his trade, may he deduct from those profits something on account of the annual value of his premises which have been used during the year to carry on the trade, and attribute part of the 2000*l.* to the 8000*l.* that he has employed as what may be called his floating capital and the other part to the 10,000*l.* invested in the premises? If you look simply at r. 3 of the First Case it would be said that he cannot make any deduction for the sum invested in his premises because the deduction for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern is not to be allowed.

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But when you turn to r. 1 of the "Rules applying to both the preceding Cases" you find that he is allowed to deduct the value of the part of any dwelling-house which may be used for the purpose of such trade, and you also find in r. 2 thereof an express provision that the computation of the duty to be charged in respect of any trade is to be made exclusive of the profits or gains arising from lands occupied for the purpose of such trade. Now it might be difficult to deal with the two sets of deductions in these two rules, but the construction of r. 2 appears to be perfectly plain, that when you are assessing the profits of a trade carried on in premises you are to assess separately the profits of the trade and the profits made from the use of the premises. The present case is only concerned with the assessment of the profits made from a trade, and, following the express instructions in r. 2, one is to exclude therefrom such part of these profits as are made from lands or tenements occupied for the purpose of the trade. As I understand, the Crown attempts to exclude the operation of r. 2 by saying that one must read into it a limitation that the rule relates only to lands in the United Kingdom. I can find no ground for making such an implication. Sched. D applies to trades not only within but also outside the United Kingdom, and it seems to me that r. 2 applies to trades whether they are carried on within or outside the United Kingdom. In *Russell* v. *Town and County Bank* (1) it appears to have been treated as too clear for argument that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. The learned Law Lords there had not their attention called to the particular r. 2. They were able to arrive at the result—and indeed it was not argued that they should not—from the earlier rules. It appears to me that when r. 2 is looked at the view that the learned Law Lords all adopted in *Russell's Case* (1) is amply confirmed by the express language of the rule.

The only remaining point is that it is said that s. 9 of the Act of 1898 provides that you shall not deduct on account of the annual value of the premises used for trade a sum exceeding the amount of the assessment of the premises for the purpose of income tax under Sched. A, and that inasmuch as the lands in Penang and

(1) 13 App. Cas. 418.

Singapore do not enjoy the blessing of assessment to income tax under Sched. A, you must not deduct more than the amount of that assessment, and that as there is no assessment you must not deduct anything. It appears to me that the more rational reading of the section is that the section only applies in cases where there is an assessment under Sched. A and does not apply to lands which are not assessed to Sched. A at all and must be dealt with in another way. For these reasons, so far as the main point is concerned, I have come to the same conclusion as that to which I came in *General Hydraulic Power Co.* v. *Hancock* (1) when sitting as a judge of first instance, that r. 2 affords a clear way through the labyrinth which the other sections of the Act might possibly land one in. I therefore agree with the judgments which have been delivered by the other members of the Court.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Thompsons, Quarrell & Jones.*

(1) [1914] 2 K. B. 21.

W. I. C.

K. B. D.
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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

REDERI AKTIENBOLAGET TRANSATLANTIC *v.* FRED. DRUGHORN, LIMITED.

Principal and Agent—Charterparty—Contract by Agent as "Charterer"—Undisclosed Principal—Evidence contradicting written Contract—Admissibility.

The description in a charterparty of a person as "the charterer" does not necessarily denote, as does the description "owner" in like circumstances, a position which only that person can fill. Where, therefore, the plaintiffs brought an action for breach of a charterparty as undisclosed principals of the person described in the contract as "the charterer," and the defendants objected to the admission of evidence to show that the plaintiffs were in fact the charterers, on the ground that such evidence would contradict the written contract:—

Held, that the evidence was admissible.

Decision of Lush J. affirmed.

Humble v. *Hunter* (1848) 12 Q. B. 310 distinguished.

Action in the commercial list tried by Lush J. without a jury.

In the action as originally framed the plaintiff was one Wilhelm R. Lundgren, who claimed damages for the breach of a charterparty dated February 8, 1910, of the defendants' steamship *England*. After points of defence had been delivered Lundgren died, and the Rederi Aktienbolaget Transatlantic, a company incorporated under Swedish law, were made the plaintiffs. By the amended points of claim the plaintiffs alleged that Lundgren effected the charterparty as agent on behalf of the plaintiffs. The defendants by their amended points of defence denied this allegation, and said that Lundgren entered into the charterparty as a principal.

The charterparty, which was in a printed form with the names of the parties inserted in writing, was expressed to have been made by the defendants, the owners of the *England*, and "Wilh. R. Lundgren of Gothenberg charterers." With this one exception the word "charterers," not "charterer," was used throughout.

Clause 32 of the charterparty provided that "Steamer shall fly charterers' house flag, and paint funnel their colour if required"; and by clause 36, "charterers have the option of re-letting steamer,

they remaining responsible for due fulfilment of the charter." The charterparty was signed by J. E. Hyde & Co. "by telegraphic authority of and as agents for Wilh. R. Lundgren." At the head of the charterparty the following words were printed: "Swedish South African Line. Wilh. R. Lundgren, Manager, Gothenberg."

The plaintiffs tendered evidence to prove that Lundgren had entered into the charterparty with their authority and on their behalf. Objection was taken by the defendants to the admission of the evidence.

Compston, K.C., and *Jowitt*, for the defendants. Lundgren is described in the contract as the charterer, that is, as a principal. Evidence cannot be admitted to prove that he was in fact contracting as agent for the plaintiffs, for to do so would be to contradict the description of him in the charterparty: *Humble* v. *Hunter*. (1) In that case one of the parties to a charterparty was described in it as "owner," and it was held that evidence could not be admitted to show that he was contracting as agent for the real shipowner so as to entitle the latter to sue in his own name as principal.

MacKinnon, K.C., and *Simey*, for the plaintiffs. Evidence is always admissible to prove that a party to a contract is the agent of an undisclosed principal, unless the party is expressly and unequivocally described in the contract as principal. *Humble* v. *Hunter* (1) was decided on the ground that the use of the word "owner" in the charterparty was an express description of the party as a principal. It is doubtful whether the question in *Humble* v. *Hunter* (1) would have been decided in that way at the present time, but in any case it is no authority for the defendants' contention. The word "charterer" does not convey that the party is a principal any more than the word "purchaser" in a contract of sale does. Further, in this charterparty Lundgren was not only described as charterer, but also as manager, which is a very clear indication that he was not a principal.

Jowitt in reply. The decision in *Humble* v. *Hunter* (1) was based upon *Lucas* v. *De la Cour* (2) and was approved in *Formby* v. *Formby*. (3)

(1) 12 Q. B. 310. (2) (1813) 1 M. & S. 249, 250.
(3) (1910) 102 L. T. 116.

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[LUSH J. referred to *Gadd* v. *Houghton*. (1)]

The use of the word "manager" in this charterparty is not sufficient to override the implication that Lundgren was the principal, which arises from his being described as the charterer: *Brandt & Co.* v. *Morris & Co.* (2)

LUSH J. This action is brought to recover damages for an alleged breach of a charterparty made by one Lundgren with the defendants, who are shipowners. Lundgren is described in the charterparty as the charterer, and the plaintiffs have tendered evidence to show that in making the charterparty he acted on their behalf, that he was an agent for undisclosed principals. An objection was taken on behalf of the defendants to the reception of that evidence on the ground that Lundgren was described in the charterparty in such a way as to negative the existence of an undisclosed principal, and that if evidence were admitted to prove that the plaintiffs were really the charterers it would contradict the language of the charterparty, which describes Lundgren as the charterer. In support of the objection reliance was placed upon *Humble* v. *Hunter*. (3) In that case an action was brought on a charterparty executed, not by the plaintiff, but by her son, who was described in the charterparty as the owner of the chartered vessel, and the Court held that evidence was not admissible to show that the son contracted merely as the plaintiff's agent. The judges in deciding that case relied on *Lucas* v. *De la Cour* (4), where one of several partners made a contract in his individual capacity declaring that the subject-matter of the contract was his property alone, and it was held that the partners could not sue jointly upon the contract. Lord Ellenborough C.J. said: "If one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made"; and in *Humble* v. *Hunter* (3) the Court was of opinion that that language applied to the case of a man describing himself in a charterparty as the owner, and that evidence could not be admitted to show that the plaintiff, and not her son, was the real owner.

(1) (1876) 1 Ex. D. 357.
(2) [1917] 2 K. B. 784.
(3) 12 Q. B. 310.
(4) 1 M. & S. 249, 250.

It was suggested by Mr. MacKinnon in the course of his argument that it is doubtful whether the decision in *Humble* v. *Hunter* (1) would be considered as good law at the present time, but in *Formby Brothers* v. *Formby* (2) three Lords Justices in the Court of Appeal stated that the decision in *Humble* v. *Hunter* (1) was still good law.

The question, therefore, which I have to determine is whether the admission of evidence to show that the plaintiffs are the real principals on whose behalf this charterparty was made would contradict the language of the charterparty. I will for the moment assume that the charterparty does not contain the note stating that Lundgren was the manager of a line of steamships. Even so, it is in my opinion not correct to say that the description of a person as a charterer is such a description as to make inadmissible evidence to show that he made the contract as agent for an undisclosed principal. The difference between owner and charterer for this purpose may seem slight, but in my view it is important.

A charterparty is a contract for the hire of a ship, and the description of one party to the contract as the charterer amounts to no more than saying that he is the person who is entering into the contract; it does not denote that only the person so described, and no other, can or does occupy the position of charterer; but it is otherwise in the case of the party to the contract who is described as the owner of the vessel. That is a definite statement of the man's position with regard to the ship, not only under the contract, but outside the contract also, for if a man says that he is the owner of a ship it precludes the possibility of any one else being the owner, and, therefore, evidence cannot be given to prove that he is not the owner and that some one else is. But the description of a party as the charterer merely indicates that he is a person who can sue or be sued under the contract, and if in fact he entered into the contract as agent for an undisclosed principal, then the principal can also sue or be sued. Therefore, apart from the fact that in this charterparty Lundgren was described as a manager, I think the evidence tendered is admissible. But when one finds that in the charterparty Lundgren is stated to be manager for certain named shipowners, it becomes clear on the face of the document that the description of Lundgren as charterer was not an assertion that he,

(1) 12 Q. B. 310. (2) 102 L. T. 116.

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and he alone, was interested in the contract. My attention was called to the case of *Brandt & Co.* v. *Morris & Co.* (1), but in my opinion the decision in that case has no application to the question which I have to decide here.

F. O. R.

The defendants appealed.

1918. Jan. 18. *Compston, K.C.*, and *W. A. Jowitt*, for the appellants. It is submitted that Lush J. was wrong in holding that the plaintiffs were entitled to adduce evidence to show that Lundgren contracted as their agent. On the construction of the charterparty Lundgren contracted as principal. He is described in the charterparty as the charterer, and evidence to show that he contracted as agent would contradict the written contract and as such is inadmissible: *Humble* v. *Hunter* (2); *Formby Brothers* v. *Formby*. (3) The rule that when a contract is made with an agent for an undisclosed principal either the agent or the principal may sue upon it does not apply to a contract of charter. [*Young* v. *Schuler* (4), *Gordon* v. *Street* (5), *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (6), and *Rederiaktienbolaget Argonaut* v. *Hain* (7) were also referred to.]

MacKinnon, K.C., and *Simey*, for the respondents. It is well established that when a contract not under seal is made by a person in his own name parol evidence may be adduced to show that he in fact contracted as agent for an undisclosed principal. In such a case either the agent or the principal may sue, but any defence or counterclaim that might be available against the agent would also be available against the undisclosed principal. To hold that that did not apply to such a case as the present would go far to destroy the rule. It is contended for the appellants that a charterparty is a contract of such a nature that the rule does not apply to it; but it has never been so held. In *Humble* v. *Hunter* (2) one of the contracting parties was described as "owner" of the ship, and it was no doubt held that evidence to show that he was not in fact the

(1) [1917] 2 K. B. 784.
(2) 12 Q. B. 310.
(3) 102 L. T. 116.
(4) (1883) 11 Q. B. D. 651.
(5) [1899] 2 Q. B. 641, 647.
(6) [1915] A. C. 847.
(7) (1916) *Lloyd's List*, June 16.

owner would contradict the instrument and was therefore inadmissible. But the word "charterer" is not so personal as the word "owner," and that case is distinguishable. *Schmalz* v. *Avery* (1) was a converse case. In *Humfrey* v. *Dale* (2) evidence of a trade custom was held admissible as not contradicting the written instrument (a bought and sold note), but explaining its terms, or adding a tacitly implied incident. That is an analogous case.

Compston, K.C., in reply.

SWINFEN EADY L.J. This is an appeal from an interlocutory order made by Lush J. in the action. The action is one to recover damages for breach of a charterparty dated February 8, 1910. The writ was issued by one Lundgren as plaintiff on December 14, 1912. In the year 1914 the plaintiff died, and an order was made by the judge in April, 1915, whereby the present plaintiffs, the Rederi Aktienbolaget Transatlantic, were substituted for the deceased plaintiff.

That order was made on terms, and no objection has been raised to it. It was not appealed from, and is therefore binding on the parties. When, however, the action came on for trial in December last before Lush J., objection was taken on behalf of the defendants that the plaintiffs were not the proper persons to sue, inasmuch as they were not parties to the contract, the contract having been entered into between the defendants and some one else, not with the plaintiffs.

The right solution of that difficulty, the judge pointed out, depended on the question whether the plaintiffs were at liberty to adduce parol evidence to show that the contract, although made by Lundgren, was really made by him as agent for the plaintiffs, and that the plaintiffs were the undisclosed principals of Lundgren. The plaintiffs contended that they were entitled to adduce such evidence. But the defendants alleged that it was inadmissible because it would be evidence to contradict the written contract. The learned judge decided that question in favour of the plaintiffs, and the defendants now appeal against his decision.

It appears that the charterparty was entered into on February 8, 1910, between the defendants, who are described as Fred. Drughorn,

(1) (1851) 20 L. J. (Q.B.) 228. (2) (1857) 7 E. & B. 266.

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Limited, owners of the screw steamship called the *England*, and W. R. Lundgren, of Gothenberg, charterer. There he is described as "charterer" in the singular, and then there follow various provisions with regard to the time charter of the ship for twenty-four months with the right to extend the period for what in substance is a year and three months further. There is a provision whereby the charterer may sub-let; there is an arbitration clause; and there is also a stipulation that the steamer shall fly the charterers' house flag and paint the funnel their colour if required. In the margin of the charterparty there is printed in large type "Swedish South African Line, Wilh. R. Lundgren, Manager, Gothenberg."

The evidence shows that at one time before 1904 there were two Swedish companies. One was called the Rederi Transatlantic and the other the Rederi Transatlantic Niki. They were two separate companies. Lundgren was connected with them both and signed charters for their benefit. But he also down to the year 1908 entered into charterparties on his own account. The two companies were amalgamated and became the plaintiff company, the Rederi Aktienbolaget Transatlantic. After the year 1908 Lundgren did not enter into any charters on his own account.

The first question is whether parol evidence is admissible in order to establish that the contract was entered into by Lundgren as agent for the plaintiffs. Counsel for the appellants contended that the effect of the evidence would be to contradict the written instrument because the contract describes Lundgren as "charterer" and it would be inconsistent with Lundgren's contracting as charterer if he were the agent for some undisclosed principal. In support of this contention the case of *Humble* v. *Hunter* (1) was referred to. That was the case of a person entering into a charterparty describing himself as the "owner of the good ship" referred to in the charter, and the action was brought, not by the person so describing himself as "owner," but by his mother. The Court there held that it would be to contradict the instrument for Grace Humble, the mother, to adduce evidence to show she was the principal, and that the contract was entered into by her son as her agent, because the son was described in the charter as being himself the owner of the vessel. Objection was

(1) 12 Q. B. 310.

taken that a person who signs a contract expressly as principal cannot be admitted to prove, in contradiction to the written instrument, that he was merely an agent. There can be no dispute with regard to the general rule of law. It was stated in the case of *Humble* v. *Hunter* (1), citing the language of Lord Denman C.J. when delivering the judgment of the Court in *Sims* v. *Bond* (2), where the Court said (3): "It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it." There is no doubt that where such an agreement is made it is competent to show that one or both of the contracting parties were acting as agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal, and this whether the agreement be or be not required to be in writing by the Statute of Frauds; and that evidence in no way contradicts the written instrument.

Counsel for the appellants has urged, first, that the doctrine is inapplicable to the present case because, as the contract describes Lundgren as "charterer," it would be inconsistent with it to say that he is agent for somebody else. In my judgment the case of *Humble* v. *Hunter* (1), where the language of the document described the person as "owner of the ship," and the case of *Formby Brothers* v. *Formby* (4), where the person was described by a similar phrase, "proprietor," stand upon this footing, that the descriptions there are statements of a fact showing the actual position of the parties previous to entering into the contract and what their interest is in the subject-matter with regard to which the contract extends. In the present case it is nothing of the kind. In my judgment the position would be identical if throughout the contract itself Lundgren were mentioned by name instead of being described as "charterer." For the sake of brevity it is convenient to refer to him from time to time as "the charterer." But the fact that he enters into the contract as agent for an undisclosed principal is in no way inconsistent with the position that he contracts as "charterer." The first point urged on behalf of the appellants therefore fails.

(1) 12 Q. B. 310.
(2) (1833) 5 B. & Ad. 389.
(3) Ibid. 393.
(4) 102 L. T. 116.

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Then it is said that the contract itself containing Lundgren's description as "charterer" is such that on the document itself evidence ought not to be admitted to show that he was an agent. Looking at the document as a whole coupled with the evidence that has been adduced, I should have inferred that he was entering into the contract as agent for the Swedish South African Line, the proprietors of which are the plaintiff company. The Swedish South African Line is mentioned; Lundgren is mentioned as manager, and by clause 32 the steamer is to fly the charterers' house flag. Upon the evidence I am satisfied that the only house flag was that of the plaintiff company. It appears that they had two flags which they flew according to the route voyage of the vessel, and it does not appear that Lundgren had or ever had a flag of his own. So also with regard to painting the funnel. From the evidence, which is admissible to explain the facts connected with clause 32 of the charter, I am satisfied that the flag was the flag of the Swedish South African Line, and, taking this contract as a whole, there are indications that it was entered into by Lundgren on behalf of the Swedish South African Line. But in any case I am satisfied that there is nothing in this case which excludes the general rule that evidence may be adduced to show that a person who has entered into a contract, not mentioning that he is agent, was in fact agent for an undisclosed principal.

The subsequent cases to which reference has been made seem to me to throw little light upon this. It was said that you could not take into account the heading "Swedish South African Line Limited," although it is on the face of the contract, and *Brandt & Co.* v. *Morris & Co.* (1) was referred to. That case, however, seems to me to have nothing to do with the present. There there was a contract, and at the head of it, after the expression "From Messrs. Brandt & Co.," there followed the words "For and on behalf of Messrs. Sayles Bleacheries, Rhode Island, United States." The decision was that the words in the contract merely indicated the persons on whose behalf it was made and the destination of the goods. The Lord Chief Justice said that the words there, reading them, "are to be treated as a declaration of the destination of the goods. It is said that the words are not apt to describe

(1) [1917] 2 K. B. 784, 794.

the destination, but I am not convinced by that. The person to whom and the country to which the goods were destined had to be shown, and that is a circumstance which I am entitled to take into account." The only decision there was that the language used was used for a special purpose and did in fact satisfy that purpose and bore that construction, not that you must have no regard to it.

Then it was said that there was an impossibility of so dealing with the contract as made on behalf of the plaintiffs by reason of the arbitration clause. I am unable to appreciate that. A recent case, reported in *Lloyd's List*, before Rowlatt J., was referred to. The case is not reported in such a manner as to be of any authority. But I gather that the whole point there was whether there was to be some triumvirate arbitration. The shipowner and the charterer named in the contract were proceeding to arbitration, and there was a question whether the principals could intervene and come in as third parties in the arbitration. That seems to be very far removed from anything that we have to consider in the present case.

I am of opinion, therefore, upon the evidence, and having regard to the form in which the order was drawn up, that Lush J. was right in deciding that the plaintiffs were the proper persons to sue on the charter, and that being so, the appeal fails and should be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether evidence is admissible to establish that the contract was made by one of the parties as agent for another person whose name was undisclosed. It cannot be disputed that if the parties to the contract had simply been referred to either by name or as "the party of the first part" or "the party of the second part," as the case might be, evidence would have been admissible to prove that one or both of them entered into the contract as agent for another person or other persons. That this is so, I think, quite clearly follows from the case of *Humble* v. *Hunter* (1), in which it is assumed that in an ordinary case such evidence would be admissible, and the judgment in which is founded in terms on the peculiar form in which the contract there had been made. The defendants, however, rely

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on *Humble* v. *Hunter* (1) and say that the contract in this case is also in that peculiar form which would result in the exclusion of the evidence in question.

I therefore turn to *Humble* v. *Hunter* (1) to see what the point really was in that case. The party there was described as the "owner of the good ship the *Ann*," and he sought to show that he was not the owner at all, but that somebody else was the owner, and that that somebody else was the plaintiff in the action. It was held that the statement that he was the owner of the ship amounted to a statement that he was contracting as principal, for the reason that the expression represented that the subject of the contract belonged to the person so contracting.

What have we in the present case? In the present case the party in question is described in this way: "W. R. Lundgren of Gothenberg charterer," and in the body of the contract he is referred to as "the charterers"—in the plural. I do not attach any importance to that. Apparently, whoever prepared the contract forgot to cross out the "s" except in the introduction. Is there any representation there that the person in question is contracting as principal? I can find none. "Charterer," unlike "owner," which states a fact in connection with the property the subject of the contract, only describes the nature of the contractual relation brought about by the making of the contract. That contractual relation is clearly one which, according to the ordinary principles of law, may exist either as between a person on his own account and another, or as between a person acting as agent for a principal and another. The question which of those two branches of the relation is described by the use of the word, and therefore exists in the present case, is one of fact and can only be determined on evidence, and yet it is said the evidence is to be inadmissible.

In my opinion the learned judge, Lush J., was plainly right in holding that evidence was admissible. When I look at the contract itself and at the evidence which has been adduced I agree with Swinfen Eady L.J. that the proper conclusion to come to is that the contract was made by Lundgren on behalf of the present plaintiffs, the Rederi Aktienbolaget Transatlantic, and the result is that in my

(1) 12 Q. B. 310.

opinion the judgment of Lush J. is right, and this appeal must be dismissed.

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Appeal dismissed.

Solicitors for appellants: *J. A. & H. E. Farnfield.*
Solicitors for respondents: *W. A. Crump & Son.*

G. A. S.

[IN THE COURT OF APPEAL.]

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CHARLES P. KINNELL & CO., LIMITED *v.* HARDING, WACE & CO.

Practice—County Court—Limited Company Plaintiff—Præcipe for Summons—Lodging of, by Agent of Company not a Solicitor—Representation in Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 72—*County Court Rules*, 1903 *to* 1917, *Order* LIV., *rr.* 1, 25.

A company incorporated under the Companies (Consolidation) Act, 1908, may lawfully employ an agent, who is not a solicitor, to institute proceedings in the county court and file the necessary præcipe on its behalf and, with the leave of the judge, to represent it in Court.

Per Swinfen Eady L.J.: The ancient rule that a corporation can only act by attorney (which involved an appointment under the seal of the corporation) does not extend to prevent joint-stock companies from issuing process in the county court as ordinary individuals can do, seeing that they are able to comply with all the provisions of the County Court Rules, and without appointing any attorney under their common seal to do those acts for them.

Decision of the Divisional Court, ante, p. 155, affirmed.

APPEAL from a decision of a Divisional Court. (1)

The plaintiffs were a company registered under the Companies Acts, and the defendants were indebted to them. The plaintiffs took out a default summons in the Southwark County Court under s. 86 of the County Courts Act, 1888. They employed, for the purpose of filing the necessary præcipe and affidavit which had to accompany the application for such a summons, one of their own clerks instead of a solicitor. The defendants gave notice of intention to defend, and a day was fixed for the hearing. The defendants,

(1) Ante, p. 155.

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however, did not attend, and judgment was entered against them. Subsequently the defendants, on discovering that the plaintiffs had commenced the action through an agent who was not a solicitor, applied to the county court judge to set the judgment aside on the ground that the summons had been irregularly issued. The county court judge held that it had long been the practice of county courts to allow parties to initiate proceedings by agents who were not solicitors, and following that practice he dismissed the defendants' application. The defendants appealed to the Divisional Court (A. T. Lawrence and Shearman JJ.), who dismissed the appeal but gave leave to appeal.

The defendants appealed.

Rigby Swift, K.C., and *H. J. Wallington*, for the appellants. A corporation aggregate can only appear in an action by an attorney. The authorities which affirm that proposition go back to the Year Book 21 Edw. 4, which is cited in Viner's Abridgment, "Corporations" (U), Brooke's Abridgment, "Corporations and Capacities," par. 28, and "Garrantie de Atturnei," par. 36, Bacon's Abridgment, "Corporations" (E), 2, and Co. Litt. 66b. Blackstone (Commentaries, vol. 1, p. 476) describes this incident as a disability attaching to a corporation aggregate. In *Scriven* v. *Jescott* (*Leeds*), *Ld.* (1) Bray J. appears to have described the necessity of appearing by attorney as "an infirmity of a company"; see also *In re London County Council and London Tramways Co.* (2) That being the common law rule, there is no provision to be found in the County Courts Act, 1888, or the County Court Rules which relieves corporations aggregate from this disability or infirmity in the case of actions brought in the county court, or gives the judge of the Court power so to relieve them. It is still, therefore, incumbent on such corporations to appear, sue, and defend in such actions by attorney and not otherwise. It is suggested that s. 72 of the Act of 1888 (which reproduces s. 10 of the repealed Act of 1852) enables the judge to dispense with the necessity of a corporation appearing in Court by attorney and to allow it to appear and address the Court by a servant or agent. That section provides: "It shall be lawful

(1) (1908) 126 L. T. Journ. 100; 53 Sol. J. 101.
(2) (1897) 13 Times L. R. 254.

for any party to an action or matter or for a solicitor . . . . or for a barrister retained by or on behalf of any party on either side . . . . or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the Court . . . ." If it is correct that a corporation is under a disability of suing or defending except by attorney, as an infant is under disability of suing or defending except by a next friend or guardian ad litem, it would, it is submitted, require plain and direct language to enable the judge to set aside this disability at discretion. No doubt that section enables a litigant, with the leave of the county court judge, to appear in Court by an agent who is not a solicitor, but it is submitted that that section does not extend to enable a company which by reason of its inherent nature is incapable of appearing in person to appoint an agent other than an attorney who is not a solicitor " to appear instead of " it, and to address the Court on its behalf. With regard to proceedings in an action other than appearing before the judge and addressing the Court, the respondents rely on Order LIV., r. 1, of the County Court Rules. That rule provides " Where by these rules any act may be done by any party, such act may be done either in person or by his solicitor, or by an agent, where it can be legally done by an agent." The meaning of that rule is that a party who can do any act under the rules in person may do such act by an agent unless he is under some disability from doing it. The filing of a præcipe and affidavit on an application for the default summons is a step in an action which can only be taken by the party himself or by a solicitor. It cannot be taken by an agent who is not a solicitor. For a similar reason Order v., r. 12, which provides for the transmission through the post of documents requisite for the entry of plaints, does not assist the respondents. In *In re Ainsworth* (1) it was held that an unqualified person, who, as agent for the defendant in an action in the High Court, gave notice of appearance to a writ, was acting as a solicitor in contravention of s. 2 of the Solicitors Act, 1843. And for this purpose it can make no difference whether the agent enters an appearance or takes out a summons. In this respect it is submitted that there is no difference between the practice in the High Court and that in the county court.

(1) [1905] 2 K. B. 103.

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The proceedings therefore having been irregularly commenced, the appellants are entitled to have them set aside: *Wood* v. *Swann.* (1)

J. B. Matthews, K.C., and *H. A. Hinde*, for the respondents. At common law certain persons are regarded as being under a disability to sue—namely, infants, married women, lunatics, and corporations. This disability is due to their incapacity to contract. In the case of a corporation aggregate this disability is qualified, only, inasmuch as it can contract under its common seal. In the case of a limited company that disability no longer exists: Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76, which re-enacts s. 37 of the Companies Act, 1867 (30 & 31 Vict. c. 131). A similar provision is contained in s. 97 of the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), with regard to companies governed by that Act. In Daniell's Chancery Practice, 8th ed., p. 253, it is laid down that "Companies incorporated under the Companies Act, 1908, may give a valid retainer without seal." It is true that under the Solicitors Acts an attorney to sue out process must be a qualified person. But there is nothing illegal in a litigant sending an agent to the registrar's office and the agent handing in a præcipe with the money. The agent does not thereby represent that he is acting as a solicitor. It is perfectly lawful for an agent to perform ministerial acts of that kind provided that in so doing he does not represent that he is acting as a solicitor: *In re Ainsworth* (2); *Oake* v. *Moorecroft.* (3) It is submitted, therefore, that the proceedings in this case were perfectly regular and that the respondents do not require the assistance of Order LIV., r. 1, to justify their employment of an agent who was not a solicitor. *Arnold* v. *Poole Corporation* (4) turned on the question of retainer. It was there held that an attorney who had been appointed by the mayor and town council to conduct suits but not under seal, could not recover his costs against the corporation; see also *Phelps and Woodforde* v. *Upton Snodsbury Highway Board.* (5)

But even if there was an irregularity in the institution of the present action, it is now too late to raise that point after judgment has been

(1) (1880) 25 Sol. J. 134.
(2) [1905] 2 K. B. 103.
(3) (1869) L. R. 5 Q. B. 76.
(4) (1842) 4 Man. & G. 860.
(5) (1885) 1 Times L. R. 425.

given. The common law maxim quod fieri non debet factum valet applies. *Bird* v. *Pegg* (1) is a clear authority that where an unsuccessful party allows a case to go to judgment he cannot afterwards get the judgment set aside on the ground of irregularity; see also *Coan* v. *Bowles*. (2)

Lastly, the appellants are precluded by r. 25 of Order LIV. of the County Court Rules from succeeding on this appeal. By that rule ". . . . No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity . . . ." It is submitted that the respondents bring themselves within both branches of that rule. The application was not made by the appellants within a reasonable time, and, further, they took a fresh step after knowledge of the irregularity by giving notice of their intention to defend: *Jones* v. *James*. (3)

Rigby Swift, K.C., in reply. The reason why a corporation is bound to appear by an attorney is on account of its nature. It has nothing to do with its inability to contract except under its common seal. That disability still attaches to companies incorporated under the Companies Acts. *Coan* v. *Bowles* (2) and *Bird* v. *Pegg* (1) are distinguishable. Here a judgment has been irregularly obtained by a company which could not be before the Court at all except by an attorney. Where a plaintiff has obtained judgment irregularly the defendant is entitled ex debito justitiae to have such judgment set aside: *Anlaby* v. *Praetorius*. (4)

As to the last point on r. 25: This is not a case of mere non-compliance with the rules, but a case in which a person has obtained a judgment to which he is not entitled.

[SWINFEN EADY L.J. referred to *Sutton's Hospital Case*. (5)]

Cur. adv. vult.

Jan. 28. SWINFEN EADY L.J. read the following judgment:— The plaintiffs recovered judgment in the Southwark County Court against the defendants on June 5, 1917, for the sum of 63*l.* 1*s.* 2*d.*

(1) (1822) 5 B. & Al. 418.
(2) (1690) 1 Show. 161.
(3) (1850) 19 L. J. (Q.B.) 257.
(4) (1888) 20 Q. B. D. 764, 769.
(5) (1613) 10 Rep. 30b.

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debt, and the costs of plaint and hearing fee, and 7*s.* 6*d.* expenses of a witness, the defendants not appearing at the trial. On July 16 the defendants filed a notice that they intended to apply on July 19 for an order to set aside the judgment and all subsequent proceedings and for a new trial. The ground of the application was that the plaintiffs, being a limited company, could only validly commence and carry on proceedings in the county court by a solicitor, and that, not having employed any solicitor, the proceedings were null and void ab initio and should be set aside. The county court judge dismissed the application, and on appeal the Divisional Court took the same view and dismissed the appeal. It is from this order of the Divisional Court that the present appeal is brought, with the leave of that Court.

It is now necessary to state some further facts. The plaintiffs on April 23, 1917, issued a default summons under s. 86 of the County Courts Act, 1888, against the defendants to recover their claim. This summons showed upon the face of it that it was issued by the plaintiffs without the intervention of any solicitor. The defendants raised no objection to this procedure, but took a step in the action by returning to the registrar of the county court, within the time limited for that purpose by the summons, the notice of their intention to defend the action, duly signed by them or on their behalf. They gained time by so doing, and prevented the plaintiffs from obtaining immediate judgment. June 5, 1917, was then appointed for the trial of the action, but the defendants did not appear, and the plaintiffs obtained judgment against them. On June 9 the defendants applied to the plaintiffs for time within which to pay the judgment debt, and time was allowed them. The first half of the judgment debt was paid to the plaintiffs, but the second half was not paid to them at the extended date agreed upon. Instead of paying the balance of the debt to the plaintiffs the defendants paid it into Court, and applied to the county court to set aside the judgment on the ground that the plaintiffs could only sue by employing a solicitor.

In my opinion that application, even if otherwise well founded, was altogether too late, and was properly dismissed. It is provided by Order LIV., r. 25, as follows: "No application to set aside any proceeding for irregularity shall be allowed unless made within a

reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity." The application by the defendants was not made within a reasonable time after knowledge of the alleged irregularity, and moreover they had certainly taken a fresh step after such knowledge. Even if their application were otherwise well founded, it should have been refused on these grounds. The same rule obtains in the superior Courts that a person complaining of an irregularity must come promptly and raise the point. In *Thames Haven Dock and Ry. Co.* v. *Hall* (1), which was an action by a company for calls on shares, the defendant applied to set aside the proceedings on the ground (inter alia) that the plaintiffs, although purporting to sue by attorney, had not duly appointed the attorney under their seal, and therefore that the proceedings were irregular. The action had been set down for trial, but the trial had not been reached. The Court of Common Pleas held that the objection was made too late. Tindal C.J. said that the first ground on which the application failed was that it was "too stale," adding: "I cannot understand why the defendant should lie by till the cause is ready for trial,—and would indeed have been tried before now, but for an accident,—and then come with the present application. It clearly appears from the affidavits, that he was aware of all the circumstances long ago, and he ought to have made his application immediately upon the facts coming to his knowledge. And this applies with greater force to the objection as to the want of an appointment of the attorney under seal." The Court thus refused to interfere in a summary manner, and later (2) refused to allow the matter to be raised on the record by an amendment of the pleadings. The maxim applies—Quod fieri non debet factum valet; see also *Bird* v. *Pegg.* (3)

This would be sufficient to dispose of the present appeal; but as the general question of the right of a company to take proceedings in a county court without the intervention of a solicitor has been raised and fully argued, and as we are told that the matter is one frequently arising, I am of opinion that it would be right for the Court to express its opinion upon it.

The question has been argued only with reference to companies

(1) (1843) 5 Man. & G. 274, 287. (2) Ibid. 290.
(3) 5 B. & Al. 418.

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formed under or governed by the Companies (Consolidation) Act, 1908, suing or defending in the county courts without the intervention of a solicitor.

An action in the county court is commenced by the plaintiff filing at the office of the registrar a præcipe for that purpose containing the particulars set forth in Order v., r. 4. This præcipe may be taken to the office by a person authorized by the plaintiff so to do. There is nothing in the County Court Rules requiring a plaintiff to attend in person at the office with the præcipe. Even in the superior Courts where a defendant appears in person his personal attendance at the office is not necessary. It was decided in *Oake* v. *Moorecroft* (1) that the memorandum of appearance required by s. 31 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), may be conveyed and delivered to the officer by a person authorized by the defendant to do it; and the same rule obtains under the present practice: *In re Ainsworth.* (2)

If a plaintiff in a county court desires to enter a plaint in a Court within the district of which he does not reside or carry on business, he may do so by post on complying with the provisions of Order v., r. 12; if he does so, the rule provides that the registrar "shall . . . . enter the plaint, and issue the summons": see County Courts Act, 1888, s. 73. Now the plaintiff company can comply with the forms required by Order v. to which I have referred; any person authorized to do so by the company may fill up and sign these forms on behalf of the company and leave them with or post them to the registrar. No law requires that an authority to do these acts must be under the seal of the company. Even contracts, not by law required to be under seal, may be duly entered into on behalf of a company in this manner: see the Companies (Consolidation) Act, 1908, s. 76 (previously the Companies Act, 1867, s. 37).

If, therefore, a company can in fact comply with all the forms necessary for bringing proceedings in the county court without the intervention of a solicitor, what prevents it from availing itself of this mode of proceeding? It is urged that there exists a rule of the common law that a corporation aggregate can only appear by attorney, and in support are quoted Co. Litt. 66b and other authorities. The passage cited from Coke is as follows: "But no corpora-

(1) L. R. 5 Q. B. 76. (2) [1905] 2 K. B. 103.

tion aggregate of many persons capable, be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shall not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the bodie politique consists, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor doe any act but by atturney, and homage must ever be done in person, &c."

However true in Lord Coke's time that the corporations then known to the law could not do any act (except as to small matters) but by attorney, it is not true now with regard to joint-stock companies whose powers are regulated by statute. They engage in trade and manufacture, have clerks and workmen, give credit and obtain credit in the same manner as trading firms and individuals, and in my opinion the ancient rule that a corporation can only act by attorney (which involved an appointment under the seal of the corporation) does not extend to prevent joint-stock companies from issuing process in the county court as ordinary individuals can do, seeing that they are able to comply with all the requisite conditions provided for by the rules, and without appointing any attorney under their common seal to do these acts for them.

There remains, however, the question how such a body may appear in Court, either as plaintiff or defendant. This is provided for by the County Courts Act, 1888, s. 72. As from its nature a company cannot appear in person, not having as a legal entity any visible person, it must appear by counsel or solicitor, or by leave of the judge some other person may be allowed to appear instead of the company to address the Court, which includes the examination of the witnesses and generally conducting the case. There is no limit or restriction imposed on the judge as to the persons whom he may allow, or as to the nature of the cases in which he may allow some other person to address him instead of counsel or solicitor for the company. It is left to his discretion, but except under special circumstances he would doubtless only sanction some director or officer or regular employee of the company so appearing instead of the company, and would limit his permission to cases which he thought could properly be disposed of before him, without the

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assistance of either counsel or solicitor. It must be borne in mind that s. 72 provides that "No person other than a solicitor of the Supreme Court shall be entitled to have or recover any fee or reward for appearing or acting on behalf of any other party in any proceeding in the Court."

It follows from what I have said that although this appeal would fail on the merits, apart from any special circumstances, yet the circumstances under which it is made are alone sufficient to require that it be dismissed with costs.

WARRINGTON L.J. read the following judgment:—The plaintiffs are a company incorporated under the Companies Acts. They have obtained judgment against the defendants for 63*l.* 1*s.* 2*d.* and costs in the county court of Surrey, holden at Southwark. On July 19, 1917, the defendants applied to the county court judge to have the judgment set aside on the ground that in the proceedings in the county court the plaintiffs did not appear by a solicitor but were represented by an ordinary agent. The county court judge dismissed this application and the Divisional Court has affirmed his decision. The defendants appeal to this Court.

The substantial question for decision is whether in proceedings in a county court a company incorporated under the Companies (Consolidation) Act, 1908, is entitled to institute and conduct proceedings and to appear at the trial or on an application for judgment by an ordinary agent, or can only do so by a solicitor or counsel.

A company incorporated under the Companies (Consolidation) Act, 1908, can appoint an agent either by writing signed by a person acting under its authority or by parol by any such person (s. 76). No question is raised as to the authority of the agent who in the present case signed on behalf of the plaintiff company the præcipe for entry of the plaint and caused the same to be filed and the judgment summons to be issued on which the judgment was obtained; nor is any such question raised as to the authority of the agent who appeared at the hearing when the judgment was obtained by default of the defendants. Such agent was allowed by the judge to appear instead of the plaintiff company, who of course, being a corporation, could not appear in person.

By s. 72 of the County Courts Act, 1888 (omitting immaterial parts), it is provided that "It shall be lawful for any party to an action or matter . . . . or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the Court," and, further, that "No person other than a solicitor of the Supreme Court shall be entitled to have or recover any fee or reward for appearing or acting on behalf of any other party in any proceeding in the Court." It is to my mind clear that this section contemplates that an agent not being a solicitor may be employed not only to address the Court, but to act on behalf of the party in any proceeding in the Court.

Proceedings are commenced by the entry by the registrar in the proper book of a plaint the particulars of which are stated on a præcipe, which may either be filed by the person desirous to bring the action, or, if he does not reside or carry on business in the district, be sent by him by post to the registrar: see s. 73 and Order v., rr. 4 and 12. It is provided by Order LIV., r. 1, that "Where by these rules any act may be done by any party, such act may be done either in person or by his solicitor, or by an agent, where it can be legally done by an agent." In my opinion in the case of an ordinary person there is no ground for the suggestion that it would be illegal for an agent on his behalf to sign the præcipe or to attend on his behalf and file it or to send it by post to the registrar. As to attending before the judge, there can be no possible question that an agent may lawfully appear and address the Court if the judge allows him to do so.

I can see no distinction in these respects between an ordinary person and a company incorporated under the Companies Acts; indeed, the Act expressly provides in s. 186 that "person" when used in the Act includes "a body corporate or politic."

The argument in the present case is a purely technical one, depending on the common law doctrine that a corporation aggregate having no physical existence cannot sue or be sued except by an attorney. This doctrine, in my judgment, has no application where, as is the case in the county courts, an agent may appear or act on behalf of a party and that party is a body which has power under statute to appoint an agent in the same way as an ordinary person may appoint one.

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Warrington L.J.

It was suggested that the words in s. 72 " instead of any party " are not applicable to the case of a party incapable by reason of its constitution from appearing in person. I fail to see any ground for this suggestion.

On the other point I agree with Swinfen Eady L.J. that the application to the county court judge, if otherwise well founded, ought to have been dismissed as having been made not within a reasonable time and after the defendants had taken a step in the proceedings.

On the whole I think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Cohn & Co.; Morton & Patterson.*

W. I. C.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* JONES.

Criminal Law—Indictment—Charge of Murder—Joinder of other Counts —Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 4.

An indictment for murder ought not to contain counts for other offences, such as robbery with violence.

APPEAL from a conviction at the Central Criminal Court.

The appellant was tried on January 14 and 15, 1918, upon an indictment which contained a count for murder and also a count for robbery with violence. He was convicted on both counts and was sentenced to death upon the charge of murder and to ten years' penal servitude upon the charge for robbery with violence.

Bryan, for the appellant.

Travers Humphreys and *Roland Oliver*, for the Crown.

The judgment of the COURT (A. T. Lawrence, Avory, and Shearman JJ.) was delivered by

A. T. LAWRENCE J., who, after reviewing the facts and holding that the appeal from the conviction upon the charge of murder must

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be dismissed, continued: The Court is, however, of opinion that the sentence of ten years' penal servitude upon the charge of robbery with violence must be quashed. We think that in a case of murder the indictment ought not to contain a count of such a character as robbery with violence. The charge of murder is too serious a matter to be complicated by having alternative counts inserted in the indictment. In the opinion of the Court the Indictments Act, 1915, did not contemplate the joinder of counts of this kind. The proper course in a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge.

Appeal from conviction upon the charge of murder dismissed. Sentence upon charge of robbery with violence quashed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

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[IN THE COURT OF APPEAL.]

JOSEPH EVANS & CO., LIMITED *v.* HEATHCOTE AND OTHERS.

[1916 J. 225.]

BIRMINGHAM DISTRICT REGISTRY.

Restraint of Trade—Trade Combination to Control Prices—Agreement to Restrict Output—Sale to certain Persons only on Terms and at Prices to be fixed by Combination—Agreement unlimited in Point of Time—Reasonableness as between Parties—Money for Goods sold paid into Pool—Right to Share of Pool—Account stated—Action to recover Share—Trade Union—Trade Union Acts, 1871 (34 & 35 *Vict. c.* 31), *ss.* 3, 4, *and* 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The plaintiffs were manufacturers of "cased tubes," and were members of a trade combination called the Cased Tube Association, and the defendants, who were also manufacturers of cased tubes, consisted of all the other members of the association. The object of the association was the regulation of prices in the trade, and in furtherance of that object it was provided by the rules that each member should be restricted in his output of cased tubes to a certain fixed percentage of the total output of the members, the percentage being based on the member's actual output in preceding years. Each member whose output in any month exceeded his percentage was required to pay the profits of such excess into a "pool," while each member whose output in any month was less than his percentage was entitled to receive a certain sum out of the pool. The rules provided that the members should sell their cased tubes only upon the terms and at the prices which should from time to time be fixed by the association. No means was provided by which a person who had once joined the association could terminate his membership. By an agreement made between the plaintiffs, the defendants, and certain firms, the plaintiffs, in consideration of the defendants fixing their percentage at a certain figure, agreed not to sell their cased tubes to any persons other than the said firms, who on their part agreed not to purchase any cased tubes from manufacturers other than the members of the association. The agreement provided that it should continue in force as long as the association and a certain other society, over whom the plaintiffs had no authority, continued to control prices. For several months the plaintiffs' output was less than their percentage, and they became entitled to receive from the association sums of money out of the pool, and the secretary of the association furnished them each

month with an account showing how much they were entitled to for that month. In an action brought to recover the money so due :—

Held, first, that the restraint of trade imposed by the agreement and the rules was unreasonable as between the parties, and that therefore the agreement was invalid at common law, and the plaintiffs could not recover thereon.

Held, secondly, that the association was a "trade union" within the definition in s. 16 of the Trade Union Act, 1876, and that therefore under ss. 3 and 4 of the Trade Union Act, 1871, the agreement was not void ; and that, though the agreement could not be directly enforced, the debts created under it could form the foundation for an account stated, and that the plaintiffs were entitled to recover on the accounts stated.

Bishop v. *Kitchin* (1868) 38 L. J. (Q.B.) 20 discussed.

Judgment of Low J. [1917] 2 K. B. 336 reversed on the second ground stated above.

APPEAL from the judgment of Low J., who tried the action without a jury ; reported [1917] 2 K. B. 336.

The plaintiffs were a limited company carrying on business in Birmingham as manufacturers of what are known as "cased tubes," iron tubes cased in brass and used mainly in the manufacture of bedsteads. The plaintiffs were members of a society known as the Cased Tube Association, a society composed of divers persons, firms, and companies engaged in the manufacture of cased tubes. The defendants were the members of the Cased Tube Association other than the plaintiffs. The rights and obligations of the members were regulated by the rules of the association. By rule 2 of those rules, "The object of the association shall be the regulation of prices and the taking of such action for the protection of the interests of the members as may from time to time be decided upon." In furtherance of that object the rules provided that the output of each member of the association should be limited to a fixed percentage of the total output of the members, that percentage being based on the member's actual output in preceding years. Each of the members whose output of cased tubes actually sold by such member during any calendar month was greater than the percentage to which he was entitled was required to pay into a "pool" of the association the amount of the profits derived from such excess ; while on the other hand each of the members whose output was in any month less than his percentage was entitled to have a certain

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sum paid to him out of the pool. Settlements were to be made monthly, each member being required to make monthly returns of his output to the secretary, who was at each monthly meeting of the association to report by letter or other designation the turnover of each member. By rule 21, "The association terms shall be as stated in the price lists issued from time to time." Rule 22: "Every member shall charge the basis prices, extras, and discounts as set out in the price list of the association adopted December 23, 1904, and confirmed January 23, 1908, or such other prices as may be fixed upon from time to time by the association in general meeting in the manner herein provided." By rule 35, which was headed "Resignation or Retirement of Members," any member who committed certain breaches of the rules, or "has persistently acted in a manner hostile to the interests of the association may by resolution be expelled from the association, whereupon he shall forfeit his interest in the funds or property of the association." The rule was silent as to the voluntary resignation or retirement of a member. By rule 36, "No contracts shall be allowed. No orders may be taken beyond the amount the member can supply in one month from the date order is received, except on the understanding that orders are subject to an alteration of discounts after each month's supply is delivered." Rule 38: "An object of the association being to ensure the progressive proportionate development of the business of members, the basis of the rules and regulations shall not be altered for one year from the formation of the association if any member sent in a written protest against such alteration." Rule 41: "All members of the association shall sign a legal agreement binding themselves to the observance of the foregoing rules and of any modification thereof hereafter added."

By an agreement dated June 24, 1913, and made between five firms of bedstead manufacturers, therein called "the manufacturers," of the first part, the plaintiffs of the second part, the Cased Tube Association of the third part, and the Manufacturers' Investments, Limited, of the fourth part, the association fixed the percentage of the plaintiffs at 6·81 of the whole of the output of cased tubes of the then members of the association, in consideration whereof the plaintiffs by clause 2 agreed "not to offer for sale or sell any cased tubes excepting as may be provided from time to time by the

price lists and rules and regulations of the association from time to time in force, and in addition from the day of the date hereof not to sell or offer for sale nor make delivery of any such tubes to any person, firm or company other than the manufacturers, parties hereto of the first part." The "manufacturers" by clause 3 undertook not to purchase cased tubes from any persons other than members of the association. The "manufacturers," who were not themselves members of the association, were respectively shareholders in the plaintiff company, which was a member of it, and by the agreement they undertook not to part with their shares to a person who was a stranger to the association without first offering them to members at the price which the stranger was willing to give. It was further provided that the agreement should be effective and binding upon each of the parties thereto only so long as both the Cased Tube Association and a society called the Bedstead Manufacturers' Federation continued to control prices. The Manufacturers' Investments, Limited, guaranteed to the plaintiffs the performance by the association of its undertakings under the agreement and of its obligations under the rules for the time being in force for the benefit of the plaintiffs provided that the plaintiffs abided loyally by the rules and regulations.

From the end of March, 1915, down to the end of November, 1915, the plaintiffs' output of cased tubes was in each month less than 6·81 of the total output of the whole of the members, and the plaintiffs consequently became entitled to receive from the association sums of money out of the pool in respect of their deficiency in those months, and they received from the secretary of the association a monthly account showing how much they were entitled to out of the pool in each month. The aggregate of the sums stated in those monthly accounts amounted to 958*l.* 1*s.* 7*d.* The action was brought to recover that sum under the agreement and rules, and also upon an account stated. The defendants pleaded that the action was not maintainable, on the ground that the rules of the association and the agreement of June, 1913, were illegal as being in restraint of trade.

Low J. held that the restraint of trade imposed by the agreement and the rules was unreasonable as between the parties and consequently invalid; and that the plaintiffs could not recover the money

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claim either upon the agreement and the rules, or upon the accounts stated by the association's secretary.

The plaintiffs appealed.

Disturnal, K.C., and *D. M. Hogg*, K.C. (*Gandy* with them), for the plaintiffs. The restraints must be reasonable in the interests of the contracting parties and in the interests of the public: *Herbert Morris, Ld.* v. *Saxelby*. (1) It is not suggested that the restraints in the rules and agreement are unreasonable in the interests of the public. It is only said on behalf of the defendants that they are unreasonable in the interests of the parties. The restraints are reasonable in the interests of the parties. The agreement incorporates the rules and brings the members of the association into contractual relations with each other. The pool was instituted with a view to assist in the regulation of the trade and in the equalization of prices. If the agreement is reasonable in other respects, the fact that a member is bound for life does not make it unreasonable: see *Wickens* v. *Evans* (2), which was cited by Fry L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) A partnership is really in restraint of trade, but it is not bad because it is for the lives of the partners. But if the agreement is unreasonable in this respect, this part is severable and does not taint the whole. An agreement to parcel out the stevedoring business of ports amongst the parties to the agreement was held to be valid if carried into effect by provisions reasonably necessary for the purpose: *Collins* v. *Locke*. (4) The law looks more strictly at an agreement which precludes a servant from exercising his calling after the period of service is over than at a commercial agreement for regulating trade relations between two or more firms or companies: *North Western Salt Co.* v. *Electrolytic Alkali Co.* (5); see also *Jones* v. *North*. (6) The old common law rule against enforcing contracts in restraint of trade has been relaxed in more recent times: *Attorney-General of Australia* v. *Adelaide Steamship Co.* (7) Looking at the object of the rules and agreement there is nothing amounting to an unreasonable restraint of trade. Further, even if the restraints were unreasonable, the

(1) [1916] 1 A. C. 688, 707.
(2) (1829) 3 Y. & J. 318.
(3) (1889) 23 Q. B. D. 598, 628.
(4) (1879) 4 App. Cas. 674.
(5) [1914] A. C. 461, 471.
(6) (1875) L. R. 19 Eq. 426.
(7) [1913] A. C. 781, 794.

agreement having been executed and the plaintiffs having submitted to the restraint, they are entitled to recover the consideration due in respect of it: *Bishop* v. *Kitchin*. (1)

Next, assuming that the agreement amounts to an unreasonable restraint of trade and is unenforceable at common law, the association is a trade union within the definition in s. 16 of the Trade Union Act, 1876; and by s. 3 of the Trade Union Act, 1871, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render any agreement void or voidable. This agreement therefore is no longer void; it is made valid: *Osborne* v. *Amalgamated Society of Railway Servants* (2); and though by s. 4 it cannot be directly enforced it can form the consideration for a new agreement, e.g., an account stated: *Cocking* v. *Ward*. (3) The plaintiffs can therefore recover upon the accounts stated. [*Gozney* v. *Bristol Trade and Provident Society* (4) was also referred to.]

The plaintiffs are also entitled to recover the money as money had and received to their use: *De Mattos* v. *Benjamin*. (5) The money was received to the use of those members of the association whose output was less than the percentage.

T. H. Walker, K.C., and *E. W. Cave* (*P. O. Lawrence, K.C.*, with them), for the defendants. The agreement and rules of the association go beyond what is necessary for the reasonable protection of the parties. Clause 2 of the agreement prevents the plaintiffs from selling cased tubes to any one except one of the five manufacturers, but there is no obligation on the manufacturers by clause 3 or elsewhere to buy any cased tubes from the plaintiffs. Nor is there any provision in the rules for the withdrawal of a member from the association. The restraint to be valid must be reasonable in the interests of the parties: *Herbert Morris, Ld.* v. *Saxelby*. (6) The unreasonable part of the agreement and rules is not severable from the rest: *Russell* v. *Amalgamated Society of Carpenters and Joiners*. (7) The decision in *Bishop* v. *Kitchin* (1), upon which the plaintiffs rely, cannot be supported. It is referred to in Leake

(1) 38 L. J. (Q.B.) 20.
(2) [1911] 1 Ch. 540, 558.
(3) (1845) 1 C. B. 858.
(4) [1909] 1 K. B. 901, 906, 915, 916.
(5) (1894) 63 L. J. (Q.B.) 248.
(6) [1916] 1 A. C. 707.
(7) [1912] A. C. 421.

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on Contracts, 6th ed., p. 529, and Halsbury's Laws of England, vol. 27, pp. 566, 583, 587. [*Mitchel* v. *Reynolds* (1) was also referred to.]

Nor can the plaintiffs recover on an account stated. Under s. 4 of the Trade Union Act, 1871, the agreement cannot be directly enforced. It is the same as a contract for which there is no consideration. *Cocking* v. *Ward* (2) was a case where the Statute of Frauds did not allow the action to be brought unless the agreement was in writing; it was mere procedure; and Tindal C.J. said (3): "The principle"—as to recovering on an account stated—"may not, perhaps, be applicable to cases where it can be shewn the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming; but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it." The first part of that proposition applies to the present case. An account stated on a cheque given for money won on a bet is unenforceable: *Hyams* v. *Stuart-King*. (4) It is a defence to show that the account was stated in respect of a debt void for want of consideration: Bullen and Leake's Precedents of Pleading, 3rd ed., p. 53; 7th ed., p. 486: "Unlawful" as applied to a contract in restraint of trade means unenforceable: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5); *Hilton* v. *Eckersley*. (6) An action on an account stated in respect of a debt which the law will not enforce as being void is not maintainable: *Rose* v. *Savory*. (7) The Court will not enforce either directly or by a roundabout process a contract which the law says is not to be enforced. The claim therefore on an account stated is not maintainable. [*Seago* v. *Deane* (8) was also referred to.]

Nor can the plaintiffs claim the money as money had and received to their use. No such claim is pleaded. Moreover, the defendants never received any money for the plaintiffs.

(1) (1711) 1 P. Wms. 181; 1 Smith, L. C., 12th ed., p. 458.
(2) 1 C. B. 858.
(3) Ibid. 870.
(4) [1908] 2 K. B. 696, 719.
(5) [1892] A. C. 25, 39, 46, 51.
(6) (1856) 6 E. & B. 47, 75.
(7) (1835) 2 Bing. N. C. 145.
(8) (1828) 4 Bing. 459.

Disturnal, K.C., in reply, referred to *Jeffreys* v. *Evans* (1) on the question of recovering on the accounts stated.

Cur. adv. vult.

Feb. 4. PICKFORD L.J. read the following judgment:—In this case the plaintiffs and defendants were members of an association called the Cased Tube Association, which was formed, as stated in its rules, for the regulation of prices and the taking of such action for the protection of the interests of the members as might from time to time be decided upon. Part of the scheme consists of a compensation to those members whose turnover falls below a fixed percentage of the trade by payment out of a pool or fund created by payments into it by the members whose turnover exceeds a fixed percentage.

The plaintiffs allege that there is due to them in respect of such compensation a sum of 958*l.* 1*s.* 7*d.* If the plaintiffs are entitled to recover the amount is not disputed. The plaintiffs claim this sum as due to them under their contract with the other members, and they also claim it upon an account stated. In the argument before us they also contended that they were entitled to recover the amount as money had and received by the defendants to their use. I do not think we ought to entertain this last claim. It was not pleaded and was not raised at the trial, and would, I think, require evidence in order to show whether it could be maintained, which could have been called at the trial. I therefore say nothing about it.

The defendants' defence is that the transaction was in restraint of trade and void, and therefore the plaintiffs cannot recover anything in respect of it. They do not contend that the agreement and rules of the association are unreasonable in the interests of the public, but that the restrictions imposed by them on the plaintiffs are unreasonable, and therefore the agreement and rules are in restraint of trade and void. If they show that they are unreasonable in the interests of the contracting parties this is enough to invalidate them: see per Lord Parker in *Herbert Morris, Ld.* v. *Saxelby*. (2) The curious result in this case is that the defendants are refusing to pay a sum of money to the plaintiffs, which they have agreed to pay to them, on the ground that the restrictions which they have

(1) (1845) 14 M. & W. 210. (2) [1916] 1 A. C. 706-708.

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imposed on the plaintiffs and to which the plaintiffs do not object are unreasonable and oppressive.

I think that Low J. was right in saying that the terms of the rules and the agreement imposed unreasonable restrictions upon the plaintiffs, and were therefore invalid as being in restraint of trade. Rules 21 and 22 place no limit upon the terms that may be imposed upon the members trading or upon the prices, and the rules contain no limitation of the time during which the restrictions are to operate. In the same way the agreement limits the plaintiffs' trading to the five firms mentioned therein, and provides that the arrangement shall continue so long as two bodies continue to exist whose existence is not dependent in any way upon the plaintiffs. In my opinion, therefore, the plaintiffs cannot recover upon the agreement, as it is in unreasonable restraint of trade, and the Courts will not enforce it.

If, therefore, the plaintiffs can recover at all, it must be upon the ground of an account stated. I think, if there be material to support them, there is evidence of accounts stated in the letters addressed to the plaintiffs by the secretary of the association (of which the letter of May 28, 1915, is a sample: "Dear Sirs,—I enclose copy of the April, 1915, pool statement. Your index letter is 'K.' From this you will see that your pool adjustment is 119*l.* Deduct:—Your payment to the emergency fund, three-quarters per cent. on your sales, 62*l.*—9*s.* 4*d.* Your share of expenses, 3*l.* 5*s.* 11*d.*—3*l.* 15*s.* 3*d.* Received 115*l.* 4*s.* 9*d.* Yours faithfully, Eric L. Heathcote, Secretary"). It is therefore necessary to consider from that point of view the nature of a contract in restraint of trade. Such a contract is not illegal in the sense that it is an offence against the criminal law to enter into it, but the law will not enforce it, and from the nature of the contract no valid claim can arise by virtue of it. I think it is correct to call such a contract void, or, to use the words of Lord Halsbury in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), "As, for example," contracts made "in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all." It differs, therefore, from such a contract as that in *Cocking* v. *Ward* (2), where the contract was perfectly valid and good but could not be directly enforced because of statutory difficulties of

(1) [1892] A. C. 39. (2) 1 C. B. 858.

proof. I do not think that, where a contract from its nature can give rise to no valid claim, a claim upon it can be used to found an action upon an account stated.

In this case, however, the contract has to be considered in connection with the Trade Union Acts, 1871 and 1876. I think this association was a trade union within the meaning of those Acts, and that its objects as defined in the rules were in restraint of trade. The agreement between the parties in this case was made, in my opinion, in order to carry out those purposes. Then ss. 3 and 4 of the Trade Union Act, 1871, provide that such a contract shall not be void, but that it shall not be directly enforced. The terms of the legislation are not entirely clear, but I take the effect to be that a contract made by a trade union in restraint of trade is no longer a void contract upon which no valid claim can arise, but is a valid contract upon which a valid claim can arise, although that claim cannot be directly enforced. I think it must be inferred from ss. 3 and 4 of the Trade Union Act, 1871, that it can be indirectly enforced if there be a means of doing so.

The difficulty which I have felt is whether suing in any form for the money due upon a contract is not directly enforcing it, but on the whole I have come to the conclusion that claiming it upon an account stated is not. It seems to me that this follows from the decision in *Cocking* v. *Ward.* (1) The contract there could not be directly enforced by reason of the provisions of the Statute of Frauds, but it was held that the amount could be recovered on a count for accounts stated. I think this conclusion is also supported by the cases of *Gozney* v. *Bristol Trade and Provident Society* (2), and *Swaine* v. *Wilson.* (3) The case of *Bishop* v. *Kitchin* (4) was cited to us by the plaintiffs as an authority in their favour, and I think if it can be supported to the full extent of the judgment as reported the plaintiffs are entitled to rely upon it. It seems to decide that if there be an agreement imposing an unreasonable restraint of trade upon a person he can, when he has submitted to the restraint, recover upon the contract the amount due to him for such submission, and that where, as in that case and in this, there are periodical payments each such payment may be recovered on the same ground.

(1) 1 C. B. 858.
(2) [1909] 1 K. B. 901.
(3) (1889) 24 Q. B. D. 252.
(4) 38 L. J. (Q.B.) 20.

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The case has, so far as I know, never been considered by any Court, probably because the person upon whom an unreasonable restraint has been imposed seldom wishes to enforce the agreement imposing it. It is, however, mentioned without comment in text-books as establishing the proposition I have mentioned. The case is very scantily reported, and there may be other reasons for the decision, but for either party to sue upon the contract whether the consideration be executed or not, and not upon a separate cause of action such as an account stated, is, I think, invoking the assistance of the law to enforce that which is by law unenforceable, and is inconsistent with what I think has been decided to be the nature of such contracts as expressed in the words of Lord Halsbury above quoted. I do not therefore rest my decision in any way upon that case.

The appeal must, in my opinion, be allowed, and judgment entered for the plaintiffs with costs here and below.

BANKES L.J. read the following judgment:—This is an appeal by the plaintiffs in the action against a decision of the late Low J. The action was brought to recover the sum of 958*l.* under an agreement dated June 24, 1913, or alternatively as upon an account stated. The only point relied upon by way of defence was that the agreement was illegal and contrary to public policy as being in restraint of trade. Low J. decided the point in the defendants' favour both as to the agreement and as to the account stated. The facts are not in dispute. As long ago as the year 1907 certain cased tube manufacturers at Birmingham formed themselves into an association having for its object the regulation of prices and the taking of such action for the protection of the interests of the members as might from time to time be decided upon. The scheme appears to have been in its broad outlines as follows. Every member had to bind himself to sell only at the same prices. Each member's share of the available trade was fixed at a certain proportion of the whole, and a member in any month either paid into or received from the pool according as his trade turned out to be above or below his fixed proportion for that month. The plaintiffs' claim was in respect of the amounts which they alleged to be due to them from the pool for the months April to November, 1915, both inclusive. The association was governed by certain rules to which it is not

necessary to refer in detail. Rule 41 provided that all members of the association should sign a legal agreement binding themselves to the observance of the rules or of any modification thereof. No evidence was given as to whether this rule was observed in practice or not. The plaintiffs did enter into a written agreement dated June 24, 1913, which is the one upon which this action is based. This agreement goes far beyond anything contemplated by rule 41, and no evidence was given to explain the circumstances under which it came into existence. Judging from the internal evidence afforded by the document itself, it seems to have been called into existence in the joint interests of the Cased Tube Association and another combine or association called the Bedstead Manufacturers' Federation. The peculiar feature of this case is that the defendants do not suggest that either the rules of the association or the terms of the agreement offend against the principles of the common law in being, as from the point of view of the public, in unreasonable restraint of trade, but they say that from the point of view of the plaintiffs themselves they are in unreasonable restraint of trade, and as such illegal and unenforceable. There is no question that the terms of the agreement are in restraint of trade. As pointed out by Lord Parker in *Herbert Morris, Ld.* v. *Saxelby* (1), where that occurs two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. Low J. decided that the restraint imposed upon the plaintiffs themselves by the terms of the agreement and by the rules was not reasonable. In the result I agree with the view taken by Low J., though I do not agree with all the grounds of his decision. No evidence was given as to the circumstances under which the agreement was entered into, or as to the considerations which induced the parties to bind themselves as they did. Taking the provisions of the agreement merely by themselves, it seems to me impossible to say that the restraint which the plaintiffs imposed upon themselves was reasonable, or that the provisions of the agreement are anything but one-sided and unfair. There were four parties to the agreement. Five bedstead manufacturers are the parties of the first part, the plaintiffs are parties of the second part,

(1) [1916] 1 A. C. 707.

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the Cased Tube Association and its secretary parties of the third part, and the Manufacturers' Investments, Limited, parties of the fourth part. Clause 2 of the agreement is in these terms: "In consideration of the company being allowed by the association the percentage hereinbefore referred to the company agrees not to offer for sale or sell any cased tubes excepting as may be provided from time to time by the price lists and rules and regulations of the association from time to time in force, and in addition from the day of the date hereof not to sell or offer for sale nor make delivery of any such tubes to any person firm or company other than the manufacturers parties hereto of the first part." There is no corresponding obligation on the part of the manufacturers to buy from the plaintiffs, but only an obligation to buy from members of the Cased Tube Association. It appears to me upon the face of these provisions that they provided for a state of things which might result in the shutting down altogether of the plaintiffs' manufacture of cased tubes. Whether the plaintiffs anticipated that the result of the manufacturers purchasing from members of the Cased Tube Association other than themselves would be that they would receive in money from the pool the equivalent of the profit they would have made from the sale of tubes themselves I cannot say. I am not entitled to guess. On the face of the agreement it appears to me that the provision contained in clause 2 is sufficient of itself to compel the Court to say that it is not enforceable, even at the instance of the plaintiffs themselves. There are other objections to the agreement which have been urged, particularly the one that there is no limit of time fixed during which the agreement is to remain in force. I am satisfied to rest my judgment on this point on the provisions of clause 2, so I do not propose to discuss the others.

There remains to be considered the plaintiffs' claim founded upon an account stated. It is, I think, clear that the evidence is sufficient to establish the stating of accounts showing the amounts claimed by the plaintiffs to be due. It was contended for the defendants that it was open to them to rebut the prima facie liability arising out of the account stated by showing that the debts charged in the accounts were not enforceable on the grounds already discussed. Low J. decided against the plaintiffs. At the end of his judgment he disposes of the point in these words: "For these reasons I think

that the plaintiffs' claim upon an account stated also fails, as the sole basis for the account is the arrangement which I hold to be illegal." These last words of Low J. raise a question which (but for the argument of Mr. Disturnal founded upon the Trade Union Act) might have been of great importance in this case. The question depends upon what the true view is in reference to a contract which offends against the co mon law rule as being in unreasonable restraint of trade. Such a contract is sometimes spoken of as being an illegal contract, sometimes as a void contract, sometimes, and as I think more properly, a contract which the law will not enforce: see Bowen L.J. in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) I think that some day it may have to be decided whether, in a case like the present, where the consideration has been wholly executed by the party setting up the account stated, the other party will be allowed to dispute the original debt on the ground merely that the contract under which the debt was incurred was in unreasonable restraint of the trade of the party suing on the account stated. As reported it is not easy to understand the ground of the decision in *Bishop* v. *Kitchin.* (2) It may be that some such considerations as I have suggested above may have led the Court to decide as it did, though no indication of them appears in the report.

The point taken by Mr. Disturnal is based upon the Trade Union Acts, 1871 and 1876. He says, and I think correctly, that the Cased Tube Association is a trade union within the definition contained in s. 16 of the Act of 1876. He then contends that the effect of ss. 3 and 4 of the Act of 1871 is to remove the taint attaching by the common law to the agreement sued on in this action. The point is an ingenious one, but I think that it is sound. The purpose of this trade union must, in my opinion, be judged by what was done in furtherance of its objects, as well as by what was stated in its rules. So judged its purpose was in unreasonable restraint of trade. The result under s. 3 of the Act of 1871 is that the agreement sued on is not either void or voidable merely on the ground that it was in restraint of trade. Sect. 4 of the same Act prohibits any Court entertaining any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of certain agreements which are set out in the section. The present

(1) 23 Q. B. D. 619. (2) 38 L. J. (Q.B.) 20.

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proceeding in so far as it is an action based upon accounts stated does not, in my opinion, come within the language of the prohibition. The position of the agreement sued on, therefore, under these Acts is that it is neither void nor voidable, and there is nothing in the Act which prevents the Court from accepting the debt created under the agreement as a proper foundation for an account stated. The first kind of agreement described in s. 4 is an agreement between the members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed. The point was not argued as to whether the agreement sued on came within this description. If it did, the last words in the section appear to indicate that an agreement of this description falls within the provisions of s. 3. However that may be, I think that the provisions of the Trade Union Acts justify a decision in the plaintiffs' favour on so much of the action as relates to the claim on accounts stated. On these grounds I think that the appeal succeeds, and that judgment should be entered for the plaintiffs for the amount claimed with the costs of the action and of this appeal.

SCRUTTON L.J. read the following judgment:—Joseph Evans & Co., Limited, sued various firms trading as the Cased Tube Association for a share of a pool due to them under an agreement and on an account stated. The defendants replied that the agreement was in restraint of trade and therefore illegal. Low J. agreed with this contention and dismissed the action. The plaintiffs appeal.

The judgment of the learned judge that no action can be brought on the agreement itself appears to me correct. The Cased Tube Association is composed of members of the cased tube trade, and its rules regulate the conduct of that trade. The plaintiffs are members of the association, and the agreement, to which they and the Cased Tube Association are parties, binds them only to sell their goods in a particular way and to observe the rules of the association. The Cased Tube Association clearly comes within the definition of a trade union in s. 16 of 39 & 40 Vict. c. 22: "Any combination . . . . between masters and masters for imposing restrictive conditions on the conduct of any trade or business." If so the agreement sued on is within the words of s. 4, sub-s. 1, of the Trade Union Act, 1871

(34 & 35 Vict. c. 31), "Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods," in which case by s. 4 of that Act nothing in the Act (which has provided in s. 3 that the purposes of a trade union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement) "shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing" such an agreement as above mentioned. The effect of this is that while an agreement by a trade union which would formerly be void as in restraint of trade, and therefore illegal, though not criminally punishable or actionable, is no longer unlawful and void by reason of s. 3, that part of the effect of the previous illegality, which is that the Courts would not directly enforce the agreement, survives. The Courts would not directly enforce the agreement before this Act, if it contained restraints of trade unreasonable either (1.) in the interests of the public, or (2.) in the interests of the parties. As regards the first point, the defendants not unnaturally shrank from saying they had made an agreement against public interest, and did not contend that the restraints were unreasonable in the public interest. As they offered no evidence as to the conditions of the cased tube trade, the Court, following the principles laid down by the House of Lords in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1), was unable to say of its own knowledge that the restraints in the agreement were injurious in the public interest.

But the defendants did say the restraints were unreasonable in the interests of the parties, that is, went further than was necessary in the interests of the party for whose protection they were imposed. That party was the defendants themselves, and their position was not very meritorious. Usually the party complaining is the party restrained; but here the party restrained, the plaintiff, raised no objection to his fetters, and only asked for the agreed price for wearing them, as he had done. The complainant was the party who had received the benefit of the restraints, which he now said were more than he was reasonably entitled to; and having enjoyed this unreasonable benefit he used the excess of benefit he had

(1) [1914] A. C. 461.

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received as a reason why he should not pay for it. I do not hesitate to say that I have struggled against this contention which seems entirely destitute of merits, but the matter being one of public policy, and not of private demerit, I feel bound to give effect to my opinion that in some respects the agreement and incorporated rules contain unreasonable restraints of trade. It is enough to mention two : (1.) The plaintiffs are bound not to sell except to five named firms, who are under no obligation to buy from them, and who may all cease to exist. And this restriction is to continue so long as two trade associations continue to control prices. (2.) There is no power of withdrawal by the plaintiffs from the agreement, a matter which most of the Law Lords in the *Mogul Steamship Co.'s Case* (1) considered of great importance.

I am not so much impressed by a clause which apparently had weight with the judge below, "No contracts shall be allowed." Business men frequently confine the word "contracts" to contracts for forward delivery. Here contracts for a month's supply at a time were allowed, and there is no evidence to enable me to say that in this particular trade such a restriction is unreasonable.

For these reasons, while I am always strongly impressed with the view that it is very important from the point of view of public policy to maintain agreements which persons of full capacity have thought fit to make for the conduct of their own business, I think this agreement and the incorporated rules are in restraint of trade and are not made enforceable by action by the provisions of the Trade Union Act, 1871.

The plaintiff, however, claimed in the alternative on an account stated, for it appeared that the association sent the plaintiffs monthly statements showing the exact sum they were entitled to receive under their agreement, and it was not alleged that up to the time of the last statement the plaintiffs had not performed all the terms of their agreement, so that any defence on the lines of a breach of a condition precedent could be sustained. It is well established that accounts stated may be sued on as admissions, but are not conclusive, as it is open to examine the debt or consideration in respect of which they are stated. Thus if there is no consideration, as in an account stated for a barrister's fees (*Kennedy* v. *Broun* (2)), or the considera-

(1) [1892] A. C. 42, 46, 50. (2) (1863) 13 C. B. (N.S.) 677.

tion has failed, or there was an immoral or illegal consideration (*Rose* v. *Savory* (1)), or there was a statutory condition precedent to recovery which had not been fulfilled, as the delivery of a solicitor's signed bill (*Scadding* v. *Eyles* (2)), the claim on account stated failed. If the consideration was executed, it was not enough to defeat a claim on account stated that an action could not be brought directly for the debt. Thus in *Cocking* v. *Ward* (3), where B. orally promised to pay A. 100*l.* if A. would surrender a farm to V. and endeavour to induce V. to demise the farm to B., and A. did surrender the farm and induced V. to accept B. as tenant, an action on the agreement for the 100*l.* was held unenforceable by reason of the Statute of Frauds, as the agreement related to an interest in lands ; but an action based on an account stated, a subsequent admission of liability by the defendant, succeeded. It was objected that the admission would only serve as an account stated, where the debt itself does not appear incapable of recovery. The Court rejected this on principle and on authority, but Tindal C.J. said (4) : " The principle may not, perhaps, be applicable to cases where it can be shewn the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming ; but we think it applies to cases where the only objection is. that the original debt might not have been recoverable, from the deficiency of legal evidence to support it."

Now, as already pointed out, since the Act of 1871 a contract in restraint of trade between members of a trade union is no longer void, but is not directly enforceable. It appears to be what is sometimes called " an agreement of imperfect obligation," and the question is whether executed consideration under such an agreement can be a good consideration for a promise to pay implied from a subsequent account stated. Under the well-known doctrine of *Lampleigh* v. *Brathwait* (5) a past consideration executed on request is a good consideration for a subsequent promise to pay ; and this has been held and the promise to pay enforced where the past consideration was executed under a contract which owing to its

(1) 2 Bing. N. C. 145.
(2) (1846) 9 Q. B. 858.
(3) 1 C. B. 858.
(4) Ibid. 870.
(5) (1615) Hob. 105 ; 1 Smith L. C., 12th ed., 159.

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conflicting with some rule of law could not be enforced. The liability to pay a sum admitted to be due under a contract unenforceable by reason of the Statute of Frauds is one instance of this: see *Cocking* v. *Ward*. (1) Another instance is the liability before the Infants' Relief Act, 1874, of a person of full age for goods supplied during infancy on an account stated during infancy, and ratified after full age, as appears from the judgment of Parke B. in *Williams* v. *Moor*. (2) The liability of the giver of a promissory note, the consideration for which was that the giver had received money under another promissory note the claim for which was barred by the Statute of Limitations, illustrates the same rule: *La Touche* v. *La Touche*. (3) Indeed, though Tindal C.J. in *Cocking* v. *Ward* (1) doubted whether the principle would apply in the case of an account stated for money paid in a transaction void under the usury laws, the Court of Exchequer in 1863 in *Flight* v. *Reed* (4) held (Martin B. dissenting) that a bill of exchange given after the repeal of the usury laws, the consideration for it being a previous bill of exchange for money received which could not be sued on as the transaction was void under the usury laws, could be sued on on this principle. Pollock C.B., in giving the judgment of the majority, refers with approval to the learned note to *Wennall* v. *Adney* (5), which states the same position. The distinction is between transactions valid but unenforceable owing to some statutory provisions, and transactions which the law would either punish as positively illegal, or would take no notice of at all as void though not punishable or actionable. A contract not void but unenforceable under the Trade Union Act of 1871 comes within the first class, and executed consideration under such a contract would under this principle be good to support an account stated. The executed consideration need not be money payment; action or abstention from action at request will do; the past consideration in *Lampleigh* v. *Brathwait* (6) was "riding at his own charges from London to Roiston, when the King was there, and so to and from Newmarket, to obtain pardon for the defendant" for a felony.

(1) 1 C. B. 858.
(2) (1843) 11 M. & W. 256.
(3) (1865) 3 H. & C. 576.
(4) (1863) 1 H. & C. 703.
(5) (1802) 3 Bos. & P. 247, 249.
(6) Hob. 105; 1 Smith L. C., 12th ed., 159.

When, however, the consideration was only executory, and the contract was unenforceable, the principle did not apply: *Earl of Falmouth* v. *Thomas*. (1) In that case none of the consideration was pleaded as executed. In the present case the money paid into the pool is divisible each month, and up to the time of the last month's account stated the consideration moving from the plaintiffs, the abstention from trading and observance of the rules, is executed, and the defendants have got the benefit of the pool. A part executed consideration on request appears to me to be in the same position as an executed consideration; the effect of the execution of all that can be executed at the time is not destroyed by the fact that in the future some more remains to be executed.

It remains to consider the case of *Bishop* v. *Kitchin* (2) in 1868. A traveller covenanted not to solicit orders for any person but his employers in the West of England, South Wales, or any district whatever in consideration of a salary and an annuity. An action was brought for arrears of salary while in the defendants' service, and of annuity when he had left their service. The defendants demurred to the count for the annuity on the ground that the agreement set out was bad as in restraint of trade. The Court, Cockburn C.J., Lush, Hannen, and Hayes JJ., held that, if it were, as the plaintiff had submitted to the restraint he could recover the consideration. The case, as far as I can discover, has never been followed or doubted, but is cited in recent text-books without comment. If there were some account stated it would stand on the same footing as *Flight* v. *Reed* (3), the case under the usury laws; but in the absence of such an element I do not understand, with respect to the eminent judges who decided the case, how you can sue on a contract which is, in the language of Lord Halsbury in the *Mogul Steamship Co.'s Case* (4), "void in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all," unless it is on the ground that the contract in restraint could be severed and the illegal part rejected, which is not the ground in the judgment of the Court as shortly reported. It is because the contract in this case is under the Trade Union Act, 1871 (which was not in force when *Bishop* v.

(1) (1832) 1 C. & M. 89.
(2) 38 L. J. (Q.B.) 20.
(3) 1 H. & C. 703.
(4) [1892] A. C. 39.

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Kitchin (1) was decided in 1868, and would not have applied in any event to the facts of that case), not void that I feel able to hold that the plaintiffs can recover here on the series of accounts stated contained in the monthly pool accounts.

It was further argued before us that the amount could be recovered as money had and received to the plaintiffs' use. This, however, was not pleaded or argued in the Court below, and to give a final decision on it would, in my opinion, require more accurate knowledge of facts than we at present possess. I do not therefore deal with it.

In my opinion the appeal should be allowed, and judgment entered for the plaintiffs for the amount claimed on accounts stated. As the claim on the agreement has, in my opinion, involved no extra costs I think the judgment should be with costs here and below.

Appeal allowed.

Solicitors for plaintiffs: *G. H. Walker & Tree, for Moore-Bayley & Co., Birmingham.*

Solicitors for defendants: *Davis & Taylor, for David Davis & Oerton, Birmingham.*

(1) 38 L. J. (Q.B.) 20.

W. F. B.

[IN THE COURT OF APPEAL.]

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Jan. 31;
Feb. 9.

KIMBER *v.* GAS LIGHT AND COKE COMPANY.

[1917 K. 76.]

Negligence—Repairs to unoccupied House—Defendants employed to effect Gas Alterations—Defendants' Workmen making Hole in Floor—Concealed Danger—Person lawfully on Premises unaware of Existence of Hole—Duty to warn.

The owner of a house let it to a tenant and agreed to put it in repair and to convert it into two maisonettes. The owner employed a builder to do the work and instructed him to employ the defendants to execute the necessary work in connection with the gas fittings. The defendants' workmen in the course of their work removed a board in the floor on the first floor landing, leaving a hole about 3 feet long and 6 inches wide. The tenant, being desirous of letting the upper maisonette, employed a house agent for that purpose, who gave the plaintiff an order to view the house. The plaintiff went to the house with the order, and was admitted by the defendants' workmen. She asked them which part of the house was to let, and they told her the upper part. She then went upstairs, and in crossing the first floor landing she put her foot into the hole, which was unfenced, and was injured. The landing was dark, and the defendants' workmen, who saw her go upstairs and knew that the hole was unfenced, did not warn her of the danger. In an action against the defendants to recover damages for the injuries so sustained the jury found that the defendants' workmen were not negligent in leaving the hole unfenced, but were negligent in not warning the plaintiff of the existence of the hole, and that the plaintiff was not guilty of contributory negligence. The judge, who tried the case and who by consent had power to draw inferences of fact, found that owing to the insufficient light the unfenced hole was a concealed danger to any one who did not know of its existence, and he gave judgment for the plaintiff for the damages awarded by the jury:—

Held, that the defendants' workmen, having created the dangerous condition of the flooring and knowing that the plaintiff was lawfully going to the place where the danger was, were under a duty to warn her of the existence of the hole; that this duty arose independently of the occupation of the premises or of any invitation or licence; and that as the hole was made in the ordinary course of the workmen's duty the defendants' were liable.

APPEAL from the judgment of Shearman J. at the trial of the action with a jury.

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The following statement of facts is taken substantially from the judgment of Pickford L.J. :—

The Electric Railways Company of London let a house to a tenant and undertook to put it in repair for him. For this purpose they employed a firm of builders to whom they gave instructions to convert the house into a pair of maisonettes. They also instructed the builders to employ the defendants to do the necessary work connected with the gas which was required for these purposes. In the course of the work the defendants' workmen removed a board on the upstairs landing leaving a hole, described by the plaintiff as about 3 feet long and 6 inches wide, a little distance from the head of the stairs. The tenant intended, when the repairs and alterations were completed, to occupy the lower part of the house himself and to let the upper part, and for the latter purpose he put the house into the hands of a house agent. The plaintiff, who wanted a flat or maisonette, applied to the house agent and got an order to view. With this she went to the house, and when she knocked at the door it was opened by the defendants' workmen, who were employed on the work for which the hole was made. She asked them what part of the house was to be let, and they said the upper part. She then went upstairs, went into one room on the right, in doing which she did not go to the hole, then crossed the landing to the room on the other side, and in coming back to the staircase put her foot in the hole and was badly injured. There was no evidence that the defendants' workmen had any knowledge that persons were likely to come to view the house, but they saw that the plaintiff went upstairs and knew that she went to inspect the upper part. It was about 3.30 to 4 P.M. on March 3, 1916 ; the day was wet and the landing was dark and badly lighted.

The learned judge left these questions to the jury, which with the answers thereto were as follows :—(1.) Were the gas company's servants negligent in failing to protect the hole ?—No. (2.) Were the company's servants negligent in not warning the plaintiff of the existence of the hole ?—Yes. (3.) Was the plaintiff guilty of contributory negligence ?—No. (4.) Damages ?—275*l*. The learned judge under a power by consent to draw inferences of fact found (as the Lord Justice thought rightly) that the hole if left unfenced would be dangerous to any one who did not know and was not

warned of it, and that owing to the insufficient light at the time the accident happened it would be a hidden or concealed danger.

The learned judge gave judgment for the plaintiff.

The defendants appealed.

Thorn Drury, K.C., and *C. Doughty*, for the defendants. The defendants were not in occupation or control of the house, and they did not invite or license the plaintiff to come upon the premises. Their workmen had no authority to invite or license any one to come into the house. The negligence found is in not having warned the plaintiff of the existence of the hole. The defendants were not liable for a mere omission. No doubt they owed a duty to a person lawfully on the premises not actively to injure him, as, for instance, by negligently letting a hammer fall upon him. The defendants' workmen were not negligent in making the hole in the floor and in leaving it unfenced, and as they did not occupy the house or have any control over it they owed no duty to the plaintiff to warn her of the existence of the hole. In all the cases except *Corby* v. *Hill* (1) the person held liable as inviting or licensing the plaintiff to come on the premises was the owner or occupier. As Bowen L.J. said in *Le Lievre* v. *Gould* (2), "It is because he"—the owner of premises—"has the conduct and control of premises which may injure persons whom he knows are going to use them, and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connection with him." The same principle is stated by Romer J. in *Scholes* v. *Brook.* (3) *Heaven* v. *Pender* (4), as explained in *Caledonian Ry. Co.* v. *Mulholland* (5), illustrates the same principle. In *Indermaur* v. *Dames* (6) the defendant was the owner and occupier of the premises. In *Hayn* v. *Culliford* (7) and *Meux* v. *Great Eastern Ry. Co.* (8) the distinction is drawn between misfeasance and nonfeasance. The defendants therefore are not liable. [*Hounsell* v. *Smyth* (9), *Winterbottom* v. *Wright* (10), *Earl* v.

(1) (1858) 4 C. B. (N.S.) 556.
(2) [1893] 1 Q. B. 491, 502.
(3) (1891) 63 L. T. 837, 839.
(4) (1883) 11 Q. B. D. 503.
(5) [1898] A. C. 216, 226, 227.
(6) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(7) (1879) 4 C. P. D. 182, 185.
(8) [1895] 2 Q. B. 387.
(9) (1860) 7 C. B. (N.S.) 731, 744.
(10) (1842) 10 M. & W. 109.

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Lubbock (1), *Bolch* v. *Smith* (2), *Clarke* v. *Army and Navy Co-operative Society* (3), and Clerk and Lindsell on Torts, 6th ed., p. 505, were also referred to.]

Holman Gregory, K.C., and *Ellis Hill*, for the plaintiff. The principle is that if a person has created a hidden danger, either on his own land or on the land of another, and he knows that another person is lawfully going to the place where the danger is, it is his duty to warn that person of the danger. That is laid down in *Gautret* v. *Egerton* (4), where Willes J. said: "The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land not . . . . alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers." And later on he said (5): "The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee." *Lowery* v. *Walker* (6), *Latham* v. *Johnson* (7) and *Wilson & Co.* v. *Barry Ry. Co.* (8) were decided on this principle, and it is re-stated by Scrutton L.J. in *Hayward* v. *Drury Lane Theatre, Ld.* (9) The doctrine is not confined to the owner or occupier of premises; it extends to persons who, like the defendants, are lawfully on the premises doing work there, and who create a concealed danger. The principle does not rest on invitation or licence; the value of the expression "invitation" "may not improperly be said to be, that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty": per Brett M.R. in *Heaven* v. *Pender*. (10) Inasmuch as the defendants' workmen lawfully opened the floor in the course of their work, they were acting within the scope of their employment, and the defendants are liable.

(1) [1905] 1 K. B. 253.
(2) (1862) 7 H. & N. 736.
(3) [1903] 1 K. B. 155.
(4) (1867) L. R. 2 C. P. 371, 374.
(5) Ibid. 375.
(6) [1911] A. C. 10.
(7) [1913] 1 K. B. 398.
(8) (1916) 116 L. T. 71.
(9) [1917] 2 K. B. 899, 913, 914.
(10) 11 Q. B. D. 512.

Thorn Drury, K.C., in reply. The making of the hole was not creating a concealed danger or trap, because the workmen had no reason to suppose that strangers would come upon the premises.

Cur. adv. vult.

Feb. 9. PICKFORD L.J. read the following judgment:—The facts of this case are substantially not in dispute, and the only question is whether on the facts and the findings of the jury there is any legal liability in the defendants. [The Lord Justice stated the facts.] No objection was taken to the direction to the jury except that it was said that the learned judge ought to have asked them whether it was negligent in the plaintiff to go into the house or upstairs at all considering the darkness. I do not think any case was made as to darkness which required such a question, and I think the summing-up cannot be attacked.

The real point made by the defendants is that, as there was no negligence in making the hole and leaving it unfenced, they were under no duty to the plaintiff to warn her of its existence, as they were not occupiers of the house and did not invite or license her to enter it, and that therefore the second finding of the jury cannot be supported. The defendants by their servants were not in occupation of the house, but they had sufficient control of it by the licence or invitation of the owner and tenant to justify them in making a hole in the flooring for the purposes of their work. I do not think that they invited or licensed the plaintiff to come upon the premises, and I attach no importance to the fact that the defendants' workmen opened the door and told the plaintiff which part of the house was to let except that it informed them that she had come by the licence of the tenant to inspect the premises, and that she was going directly to the landing in which they had made the hole. They of course knew the conditions as to lighting and otherwise which existed on the landing. If they had known that persons were likely to come to the premises for lawful purposes I think they would have been negligent in making and leaving a hole which under the circumstances would be a concealed danger to such persons unfenced and without warning. See per Willes J. in *Corby* v. *Hill* (1), where the obstruction was in a

(1) 4 C. B. (N.S.) 556, 567.

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private, not a public, road. In this case they had no reason to expect such persons to come, and therefore the making of the hole was found by the jury not to be negligent, nor was the leaving it unfenced, up to a point, negligent. But when the workmen let the plaintiff in and knew that she was there lawfully by the licence of the tenant and was going to the very landing where the dangerous hole was, I think that the same principle applies. They knew that what in the other case would have been anticipated had in fact happened in this, and I think that the same duty then arose towards the plaintiff, and that it was negligence any longer to leave the hole unfenced and without warning. As this was done in the ordinary course of their duty the defendants are responsible for their actions and the appeal must be dismissed with costs.

BANKES L.J. read the following judgment:—This is an appeal from Shearman J. The facts are not in dispute. Some workmen in the employ of the defendants were engaged in making alterations in an unoccupied house. In the course of their work they removed a board on the first floor landing, and left the hole so made unfenced and unguarded. The landing was badly lighted, and the existence of the hole rendered the place dangerous to any one who was unaware that it was there. The plaintiff, who had obtained an order to view the house from a house agent, was admitted into the house by one of the defendants' workmen. As a result of the verdict of the jury it must be taken that the man who so admitted the plaintiff was one of those who removed the board, and that he knew that the landing in its then condition was dangerous and that the plaintiff, if allowed to go upstairs, would pass across the landing. He gave the plaintiff no warning of the existence of the hole. Shearman J. put certain questions to the jury, including a question whether the workmen had been guilty of negligence (*a*) in not fencing or guarding the hole, or (*b*) in not warning the plaintiff. The jury answered the first question in the negative and the second in the affirmative. They also found that the plaintiff had not been guilty of contributory negligence. Upon these findings the defendants claimed that they were entitled to judgment upon the ground that the defendants' workmen were under no duty to warn the plaintiff. Shearman J. decided against this contention. It is from this

decision that the present appeal is brought. In my opinion the appeal fails. To test the defendants' contention I will take a case to which the same rule of law must apply as in the present case, though the answer may seem more obvious than in the present case. A lift in a private house is out of order. It is stationary at the fifth floor. A workman is sent for to put it right. In order to get at part of the lift which requires attention he disconnects the brake. In its then condition he knows that if any one enters the lift it will fall to the bottom of the house. While standing by the door of the lift he sees a maidservant approaching the lift, obviously intending to enter it. He gives her no warning. She enters, the lift falls, and she is seriously injured. Was the workman under no duty to warn the maidservant? Our law would be indeed inhuman if he was not. In my opinion the rule of law applicable to that case and to the present is at least as wide as this, namely: If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning. There may be cases in which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence. It is not necessary for the purpose of the present case to discuss the rule except in its simplest form. The duty arises quite independently of the occupation of premises. It does not arise out of any invitation or licence. It is not a case of mere omission. The duty arises out of the combination of all the circumstances to which I have referred. In my opinion the appeal fails.

SCRUTTON L.J. read the following judgment:—Two workmen of the Gas Light and Coke Company were altering the gas fittings in a house which had been let to a tenant, who was converting it into two flats, one of which he proposed to let. In doing this the workmen had taken up a board on a dark landing. While the workmen were still in the house and the board was up, a lady, to whom the tenant had given an order to view the top flat, knocked at the door. One of the workmen opened it; she showed her order to view and

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Scrutton L.J.

passed in up the stairs. The workman did not tell her of the hole where the board was up. She passed it once, but fell into it on her return, and damaged her knee. She sued the gas company. The jury found there was no negligence in leaving the hole open, but that there was negligence in not warning the plaintiff that the hole was there; and that the plaintiff was not guilty of contributory negligence. The judge, to whom other questions were left, found that the hole was a trap, i.e., a danger which could not be avoided by a person previously ignorant of it, but who used reasonable care; and entered judgment for the plaintiff. The gas company appeal.

I leave out of question any liability of the gas company based on invitation, for I think it is clear that the workmen had no authority from the gas company to invite people to walk about the house. The case is in my view the same as if the door had been open and the workmen had seen a person lawfully on the premises going towards the hole and had not warned him, or had known that persons lawfully there might be passing along the landing and had given no warning.

It is clear that persons lawfully doing a work which interferes with a public right, as contractors opening the highway, must use reasonable care not to injure persons lawfully using the highway, which would include taking reasonable precautions to warn such persons of dangers created by the contractor, which the passer-by could not with reasonable care discover. But it is said the case is different when the work is done on private premises in which the contractor has no proprietary or possessory interest, and on which he is only a licensee of the owner. The contractor's duty, it was said, was only not actively and negligently to injure other persons on the premises, as by carelessly dropping hammers on their heads; and included no duty to warn them of dangers, even hidden ones, which the contractor's work had created, as holes in dark passages. There are, of course, cases where there is moral culpability, but no legal liability. A. sees a blind man walking along the highway straight into a pond, and gives him no warning; A. is not legally liable, for he is under no legal duty to B. But if A. has himself made the hole in the highway, he is under legal liability at once: *Penny* v. *Wimbledon Urban Council.* (1) I cannot see that it makes

(1) [1899] 2 Q. B. 72.

any difference that B. is a person lawfully on private premises where A. has made the hole, or that A. is under a duty as to his acts towards B., such as not to hit him with his tools, different from his duty to warn B. of dangers A. has created, which are not discernible by reasonable care on the part of B. It is A.'s duty to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B., who is going towards a hidden danger A. has created.

It was said there was no authority for this position, but, as Lord Macnaghten said, the plainer a proposition is the harder it often is to find judicial authority for it. In my view, however, the facts in *Corby* v. *Hill* (1) raised the question. A person licensed to use a private road sued a person licensed in course of doing repairs to place materials on the road for negligence in not protecting the materials and succeeded. The declaration suggested by Willes J. appears to me to cover this case. In *Bolch* v. *Smith* (2), where one licensee failed to recover against another licensee who had placed an obvious danger in his way, Wilde B. reserved the question whether, if the danger had been a trap, he would not have been liable. I think he would, and that is this case. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *A. E. Pratt.*

Solicitors for defendants: *Monier-Williams, Robinson & Milroy.*

(1) 4 C. B. (N.S.) 556, 567. (2) 7 H. & N. 736.

W. F. B.

1918
Feb. 4, 5, 8, 14.

HURD AND OTHERS *v.* WHALEY AND OTHERS.

Landlord and Tenant—Relief of Underlessee after Forfeiture of Lease—Conditions of Relief—Breach of Covenant to Repair—Conveyancing Act, 1892 (55 *&* 56 *Vict. c.* 13), *s.* 4.

Where a lease has been forfeited for breaches by the lessee of a covenant to repair the fact that an underlessee has been guilty of breaches of a similar covenant in the underlease does not disentitle the latter to relief under s. 4 of the Conveyancing Act, 1892.

Dictum of Lopes L.J. in *Imray* v. *Oakshette* [1897] 2 Q. B. 218, 225, considered.

TRIAL of action before McCardie J.

By an indenture of lease dated August 28, 1863, the plaintiffs' predecessor in title demised to William Whaley a building plot in Battersea with five houses then being erected thereon for a term of ninety-eight years at a yearly rent of 17*l.* The houses were numbered 23, 25, 27, 29, and 31, Bognor Street. By the lease the lessee covenanted to repair the houses then being erected, to paint the outside wood and iron work once in every three years and the inside once in every six years. The lease also contained the usual proviso for re-entry upon breach of any of the covenants. In November, 1916, it was found that all the five houses were in a state of disrepair, No. 31 seriously so, and the others (including Nos. 23 and 25) to a less degree. At that date the reversion expectant on the determination of the lease was vested in the plaintiffs, while the lease had become vested in James O'Mahoney, and Thomas Saunders was in possession of Nos. 23 and 25 under an underlease for the whole of the term in the head lease less eleven days. By that underlease he had entered into covenants to repair and paint the said two houses similar to those contained in the head lease. The plaintiffs prepared a schedule of dilapidations and served a notice under s. 14 of the Conveyancing Act, 1881. The notice was not complied with, and on May 4, 1917, the plaintiffs commenced this action claiming possession of the five houses against O'Mahoney, the assignee of the lease. O'Mahoney applied to the Court under s. 14, sub-s. 2, for relief against the forfeiture claimed. Saunders, the underlessee, also appeared as defendant under Order XII., r. 25, and counterclaimed for relief in respect of the two houses in his possession

under s. 4 of the Conveyancing Act, 1892, asking for an order vesting the said two houses in him for the residue of the term of the underlease.

J. D. Crawford, for the plaintiffs. The defendant Saunders is not entitled to relief, for he has himself been guilty of breaches of the covenants to repair contained in his underlease. In *Imray* v. *Oakshette* (1) Lopes L.J., speaking of the relief which may be given to an underlessee under s. 4 of the Act of 1892, said: "It is a relief which ought to be given with caution and sparingly. . . . . Before asking for it the underlessee ought to be in a position to prove that he is blameless." Here he has certainly not been blameless.

Van den Berg, for the defendant O'Mahoney.

Cartwright Sharp, for the defendant Saunders. The dictum of Lopes L.J. in *Imray* v. *Oakshette* (1) was intended to be confined to a case of the kind with which the Court were there dealing, where the application by the underlessee for relief was after a forfeiture of the lease for one of the breaches of covenant expressly excepted from the operation of s. 14 of the Act of 1881 by sub-s. 6 of that section (in that case a covenant not to assign without licence), and as to which consequently no relief can be given to the lessee. That has no application to the case of a breach of covenant to repair, in respect of which the lessee can get relief against forfeiture. The effect of Lopes L.J.'s dictum has been considered by Parker J. in *Matthews* v. *Smallwood* (2), in which case also the question was as to the conditions under which relief could be granted to an underlessee against the consequences of the underlessor's breach of covenant not to underlet without licence. Though expressing some doubt as to the correctness of the earlier decision, he felt bound to follow it; but at the same time he was of opinion that in any event its operation was limited to the case of that particular covenant, and that "negligence is immaterial in respect of cases in which relief can now be given to a lessee."

Crawford in reply.

Cur. adv. vult.

Feb. 8. McCARDIE J., after expressing his willingness to grant relief against forfeiture to the lessee O'Mahoney upon certain terms,

(1) [1897] 2 Q. B. 218, 225. (2) [1910] 1 Ch. 777.

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McCardie J.

including the giving of security for the due execution of the necessary repairs, proceeded as follows: But it may be that the lessee O'Mahoney will fail to comply with the terms I impose. In such case the question of relief to Saunders will arise. Mr. Crawford has, however, vigorously contended that I am precluded in any event from granting relief to Saunders by reason of the judgment of the Court of Appeal in *Imray* v. *Oakshette*. (1) It is said that because Saunders has failed to keep Nos. 23 and 25 in proper repair he has committed a personal breach of covenant as between O'Mahoney and himself, and is debarred from the beneficial provisions of s. 4 of the Act of 1892. I find that the interiors of both houses need certain repairs, and it is clear that neither house has been painted in accordance with the provisions of the underlease. The vital words in *Imray* v. *Oakshette* (2) appear in the judgment of Lopes L.J.: "Assuming the jurisdiction, ought relief to be granted to the underlessee in this case? It is a relief which ought to be given with caution and sparingly. It is exceptional. It could not be given to the lessee. It materially affects the interests of lessor and lessee. Before asking for it the underlessee ought to be in a position to prove that he is blameless and exercised all those precautions which a reasonably cautious and careful person would use." In my opinion, however, those words have no relevance to the present action. They relate only to a case where the underlessee is applying for relief after a forfeiture of the original lease has taken place by reason of a breach of the covenants or conditions mentioned expressly in sub-s. 6 of s. 14 of the Act of 1881, as, e.g., the breach of a covenant not to assign the demised premises. In such a case the lessee himself can secure no relief, but s. 4 of the Conveyancing Act, 1892, is to be treated as a substantial and independent enactment, and a sub-lessee can obtain relief thereunder even though the breach of covenant committed by the lessee precludes the latter from seeking the assistance of the Court. Where, however, forfeiture arises from a breach within s. 14, sub-s. 6, of the Conveyancing Act, 1881, the sub-lessee must show that he himself is free from blame. For the jurisdiction under s. 4 of the Conveyancing Act, 1892, is to be exercised (so the Court of Appeal held in *Imray* v. *Oakshette* (1)) with caution and sparingly. The words of Lopes L.J., however,

(1) [1897] 2 Q. B. 218. (2) [1897] 2 Q. B. 218, 225.

have no application to a case where the original lessee has incurred a forfeiture in respect of which the Court can grant relief, e.g., by breach of a covenant to repair. I follow with respect the view expressed by Parker J. in *Matthews* v. *Smallwood* (1), as to the actual effect of *Imray* v. *Oakshette*. (2) There is nothing in *Imray's Case* (2) to deter me from granting relief to Saunders should it become necessary to exercise my discretion under s. 4 of the Act of 1892. I regard *Gray* v. *Bonsall* (3) as supporting the view I have just expressed. I venture to hope that *Imray* v. *Oakshette* (2) may some day be considered by the House of Lords. The views expressed by Lopes L.J. and Rigby L.J. seem (if I may say so with the deepest respect) to cut down in the severest manner the beneficial intention of s. 4 of the Act of 1892. I myself entertain the view that s. 4 should be construed with a generous desire to save an underlessee from the grave loss which may fall upon him unless the section be liberally construed. The notion of personal negligence founded on the artificial doctrine of constructive notice seems to me to be in conflict with the object of the Act of 1892 and scope of s. 4 and to be opposed to the well-established equity leaning against the enforcement of forfeiture.

It only remains to state the form of the order I make. The substance of the order appears in Chitty's King's Bench Forms, 14th ed., p. 706. I need not read it in detail. I fix the period for performance of the covenants at four months. If the parties do not agree upon a surveyor, then a Master in chambers will nominate one. Proper security must be given as settled. I fix the surveyors and solicitors' fees in respect of the dilapidations notice of December 11, 1916, at 8*l.* 8*s.* The form of the order can be settled by counsel. There will be liberty to apply. I give the defendant O'Mahoney until February 14 to consider whether he will accept these terms or not. If he declines them I must refuse relief, and I will proceed to consider the terms upon which relief shall be granted to Saunders.

Feb. 14. The defendant O'Mahoney being unable to comply with the terms of the judge's order as to giving security, the judge gave judgment for the plaintiffs for possession against him, and granted

(1) [1910] 1 Ch. 777, 793, 794. (2) [1897] 2 Q. B. 218.
(3) [1904] 1 K. B. 601, 603, 607.

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relief to the defendant Saunders on terms to be arranged between him and the plaintiffs, he agreeing to take a lease direct from the plaintiffs on the same terms as those on which he previously held of the defendant O'Mahoney.

Judgment accordingly.

Solicitors for plaintiffs : *H. H. Wells & Sons.*
Solicitors for O'Mahoney : *Blount, Lynch & Petre.*
Solicitors for Saunders : *Wakeford May, Woulfe & Gwyther.*

J. F. C.

C. A.
1918
Feb. 8.

[IN THE COURT OF APPEAL.]

In re HEYL.

Ex parte D. P. MORGAN, LIMITED.

Bankruptcy—Practice—Petition—First Hearing—Adjournment—Request by both Parties—Jurisdiction of Registrar—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 102, *sub-s.* 2 (*a*)—*Bankruptcy Rules*, 1915, *r.* 178.

Rule 178 of the Bankruptcy Rules, 1915, prohibits any further adjournment of a petition, merely by consent of the parties, after the expiration of one month from the day appointed for the first hearing. It is not to be inferred from that provision that, during the first month, an adjournment ought as a matter of course to be granted if both parties desire it. The granting or refusal of an adjournment is entirely within the discretion of the registrar.

In re Farleigh (1905) 21 Times L. R. 198 explained.

APPEAL from a receiving order made by Mr. Registrar Francke upon the petition of D. P. Morgan, Limited, registered money-lenders, who were judgment creditors of the debtor for 1334*l.* 17*s.* 10*d.*, the act of bankruptcy being failure to comply with a bankruptcy notice to pay the judgment debt.

At the first hearing of the petition both the petitioning creditors and the debtor asked for an adjournment upon the ground, as stated to the registrar, that having regard to certain agreements which had been entered into by the debtor he would probably be able to pay all his debts in full. The nature of these agreements and the facts which were put before the registrar were as follows :—

The debtor claimed to have discovered or invented certain

processes connected with the distillation of coal tar, shale, and other raw material, and was engaged in the business of manufacturing motor spirit, fuel oil, and other products in accordance with his processes. He had established works and for a time carried on business under the name of the Rapid Distillation and Power Company; afterwards for a time under his own name. He then entered into arrangements with a company called Partners Trust, Limited, whereby he admitted them or persons nominated by them to a participation in his dealings, they finding considerable sums of money. In May, 1917, a company called the Rapid Distillation and Power Company, Limited, was registered with a capital of one million sterling in 1*l.* ordinary shares. This company was formed to take over the interests which all the parties had then acquired in the processes, together with the works, machinery, and effects of the business. Ultimately certain agreements were entered into.

The material document was an agreement dated November 27, 1917. In effect it provided for the company acquiring the property. The constitution of the company was to be altered. The ordinary shares were to be converted into preference shares bearing a non-cumulative preferential dividend of 7*l.* per cent. The capital was to be increased by 50,000*l.* divided into deferred shares of 1*s.* each. The agreement further provided that when the company's capital had been so altered there should be paid to the debtor 125,000*l.*, to be satisfied by the allotment and issue to him of 50,000 fully-paid preferred ordinary shares and 100,000 fully-paid 1*s.* shares. In addition the company was to pay to the debtor and other persons large sums in cash.

The company was registered as a private company. Two shares were subscribed for by the subscribers to the memorandum of association, one of whom was described as a typist and the other as a clerk, the whole of the subscribed capital of the company being represented by the sum of 2*l.* The date fixed for completion of the agreement was February 25, 1918, but no steps had yet been taken to carry it out.

On November 30, 1917, the present bankruptcy petition was presented. It came before the registrar on December 19, 1917. There was then no dispute with regard to the debt of the petitioning creditor or the act of bankruptcy. At that time there were three

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petitions against the debtor on the file, of which the one being heard was the first.

There was no evidence before the registrar of the formation of the company and of the details of the agreement for sale. That evidence had been filed since the hearing before the registrar, but the substance of the position was stated to the registrar. Upon that both the debtor and the petitioning creditor asked for an adjournment in order to see if the agreement could be carried into effect. It was also stated to the registrar that meetings of the other creditors had been held, with the result that they all agreed to an adjournment of the petition. The registrar, however, not assenting to the request for an adjournment, made a receiving order, and hence this appeal.

There was no evidence before the Court of Appeal that those interested in promoting the company were any more forward with regard to obtaining the capital than they were when the company was first registered. The only evidence with regard to the capital was an affidavit by the debtor in which he said: "I am informed by my solicitor and believe that persons interested in the company have promised to purchase sufficient of the shares to be allotted to me as aforesaid to enable me together with the cash payable to me by the company to pay all my liabilities in full in cash."

Clayton, K.C., and *E. W. Hansell*, for the appellant. It is the practice to grant an adjournment at the first hearing of the petition if desired by both parties. Rule 178 of the Bankruptcy Rules, 1915, provides that after the expiration of one month from the day appointed for the first hearing no further adjournment of the petition, merely by consent of the parties, shall be allowed except for the reasons set forth in r. 171, or for such other sufficient reason, to be stated in the order for adjournment, as the Court shall think fit. The inference from that rule is that the parties have a reasonable right to an adjournment at the first hearing, if there be no good ground for refusing it. It is not suggested that upon the facts before the registrar the debtor had proved that he was able to pay his debts in full, but that there was a reasonable probability of his being able to do so if certain arrangements were carried out. The debtor had convinced his creditors (who were business men) that there was such a reasonable probability. The registrar had no jurisdiction to

refuse the adjournment at the first hearing when both parties asked for it: *In re Farleigh.* (1) The effect of the receiving order is to destroy all chance of the carrying out of the proposed arrangements, which the debtor and his creditors think may enable him to satisfy his debts in full. The receiving order should not have been made at the first hearing of the petition, both parties desiring an adjournment; it should be rescinded and the petition adjourned before this Court.

Douglas Hogg, K.C., and *Tindale Davis*, for the respondents. Before the registrar the petitioning creditors consented to an adjournment. The receiving order having been made, however, it should not be rescinded; but the respondents do not object to the appeal standing over for a short time.

Sir Gordon Hewart, S.-G., and *Roland Burrows*, for the official receiver. The registrar had complete jurisdiction to make the order. In *In re Farleigh* (1) the debtor had made an actual offer to pay his debts in full. In this case it has been assumed that an adjournment can easily be had at any time. The rules are framed in order to prevent it. Rule 178 imposes a limit on the benevolence of the tribunal by providing that after a certain period no further adjournment shall be granted. It does not follow that before the expiration of that period an adjournment at the request of both parties must of course be allowed. Upon the facts now disclosed it is clear that the registrar exercised his discretion quite rightly, and the appeal should be dismissed.

Clayton, K.C., in reply. It is not suggested that the registrar is bound to grant an adjournment, but consent is a strong factor, and if there be no reason against it the petition ought to be adjourned. *In re Farleigh* (1) was really a stronger case than the present, because there the debtor only offered to pay the petitioning creditor's debt, while here he has satisfied all classes of his creditors that there is a probability of his being able to pay them in full. While the receiving order stands the debtor's attempt to carry out his scheme is rendered impossible.

SWINFEN EADY L.J. This is the appeal of the debtor from a receiving order made on December 19, 1917, and the appellant asks

(1) 21 Times L. R. 198.

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Swinfen Eady L.J.

that the receiving order may be discharged and the petition adjourned for such time as the Court thinks fit. [The Lord Justice stated the facts and came to the conclusion upon the evidence now before the Court that the receiving order was rightly made; he then continued:] Then it is said that having regard to the decision in *In re Farleigh* (1) it was the duty of the registrar to have adjourned the petition when both sides requested it. Speaking generally, I have formed the opinion that bankruptcy petitions are adjourned from time to time much more frequently than they should be. It is in the discretion of the Court, the registrar before whom the petition comes, whether an adjournment shall be granted or not. Rule 178 of the Bankruptcy Rules, 1915, prohibits any further adjournment after the expiration of one month from the day appointed for the first hearing, merely by consent of the parties, except for the reasons set forth in r. 171, or for such other sufficient reason, to be stated in the order for adjournment, as the Court shall think fit. Although that rule, therefore, contains a provision against a further adjournment, in my opinion it is not true to say that by inference it provides that during the first month adjournment ought to be as a matter of course granted if both parties desire it.

I agree with the decision of the Divisional Court in *In re Farleigh*. (1) That obviously was a case in which the petition should have been adjourned. It was a case in which on the first hearing of the petition the debtor offered to settle the debt and costs. It may be he offered to pay it or to settle it by paying in instalments, or to settle it in some other way that the parties were prepared to assent to. It does not clearly appear from the report what provision was to be made except that the debt was to be settled. It also does not appear from the report whether there were other creditors of the debtor; but upon the facts as stated, merely that upon the first hearing of the petition the debtor offered to settle the debt and costs and that the petitioning creditor, who was represented by a solicitor, considered that the offer was reasonable but wanted time to consider it, and therefore that both parties asked for an adjournment, that case was in my opinion obviously one in which the petition ought to have been adjourned. But that case

(1) 21 Times L. R. 198.

certainly does not lay down any rule that upon the first hearing of the petition, if both parties desire it, it is necessarily a matter of course that the petition shall be adjourned.

Under these circumstances, the receiving order under appeal was rightly made and the appellant has not made out any case for its discharge. In my opinion the appeal should be dismissed.

BANKES L.J. I agree, and nothing that I say must be taken to encourage the idea that an adjournment of the first hearing of a petition is a matter of course simply because the petitioning creditor and the debtor concur in making application for an adjournment. But having said that, I must say for myself that had I been in the registrar's position I think that upon the materials he had before him I should not have taken the course which he took at that time. I think that I should either have granted the application in the form in which it was made or have granted a short adjournment in order that the documents of which he was informed might be brought before him so as to enable him to form a truer appreciation of the effect of them than he could possibly have done upon a mere statement. The registrar was told in substance what the facts of the case were, and without suggesting that the gentlemen who told him intended to misrepresent the position, or to say anything unfair, one may assume that at any rate they put a somewhat better complexion upon the case than it now bears after a fuller examination of the documents. The registrar had also the fact that the assets of this debtor were of a kind which might at the present time be extremely valuable; he had the fact that considerable sums of money had been expended in developing the business, and he had the fact (and this is what would have weighed with me more than anything else) that all classes of creditors were, after investigation, anxious that an adjournment should be granted in order to give the persons interested in carrying through this arrangement some opportunity of getting it through. Under those circumstances I am inclined to think, speaking for myself, that the registrar acted somewhat hastily in the matter. But there has been an appeal, and upon the appeal we have had before us the actual materials upon which these statements were made to the registrar, and a full investigation of them—a much fuller investigation than could have

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been possible upon the materials before him. It does not appear that there is now any reasonable hope of carrying through these proposals by the date to which the adjournment was applied for. Under those circumstances, and also having regard to the attitude which is now taken up by the creditors, I think that this appeal fails.

EVE J. Although I share to the full my Lord's view that adjournments are to be deprecated, and are not infrequently indicative of a pernicious practice of resorting to the Court for other objects than the administration of the debtor's affairs by the Court, I do not myself think that an arrangement or agreement to adjourn on the first return day is open to serious criticism or ought to be disregarded without adequate cause. But in this case it must be borne in mind that we are considering the condition of things at a date approximating to the date to which the adjournment was proposed, and at which it was represented the debtor hoped to be able to pay his creditors in full. From this point of view I do not think that it can be held that the evidence discloses any reasonable probability of the debtor's hopes being realized, or that if the evidence which we have to-day had been before the registrar the order would not have been properly made; or, again, that the adjournment then asked for would have been of the slightest use to the debtor. In these circumstances I think at this stage it is quite impossible to discharge the order, and I agree in thinking the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Ernest A. Fuller.*
Solicitors for respondents: *W. B. Glasier; the Official Solicitor.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1918
Feb. 1, 5, 20.

In re NELSON.

Ex parte DARE AND DOLPHIN.

Bankruptcy—Receiving Order—Bankruptcy Petition—Subsequent Irish Arrangement Proceedings—Certificate granted to Arranging Debtor in Form of Sched. C—Effect of on English Debts—Irish Bankrupt and Insolvent Act, 1857 (20 *&* 21 *Vict. c.* 60), *ss.* 343-347, 410—*Bankruptcy* (*Ireland*) *Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 58), *ss.* 2, 58, 64—*Practice—Substituted Service of Bankruptcy Petition —Debtor out of Jurisdiction.*

By the Irish Bankrupt and Insolvent Act, 1857, as amended by the Bankruptcy (Ireland) Amendment Act, 1872, provisions are made for private arrangements by debtors with their creditors. By s. 64 of the latter Act, "So soon as the resolution or agreement made by any arranging debtor under the said Act" (i.e., the Act of 1857), "as amended by this Act, shall have been carried into effect, and the creditors of such arranging debtor shall have been satisfied according to the tenor thereof, the Court shall give to such arranging debtor a certificate under the seal of the Court in the form contained in the Schedule (C) to this Act annexed, or to the like effect; and such certificate shall thenceforth operate to all intents and purposes as if the same were a certificate of conformity under a bankruptcy under the said Act as amended by this Act":—

Held, that, according to the true construction of the Irish Acts, the provision in s. 64 that the certificate in the form of Sched. C was to have the effect of a certificate of conformity was applicable to Ireland, but did not extend to England, and that such a certificate did not afford any defence to proceedings brought in England by an English creditor for a debt incurred and payable here.

Per Eve J.: Where the effect of a foreign bankruptcy (using the word "foreign" in its restricted sense) is to divest the debtor of the whole of his property wherever situate and to vest it in the assignee for distribution amongst all his creditors wherever resident, the Courts in this country give the same effect to the order or instrument discharging the debtor in the bankruptcy as is given to it in the country where the bankruptcy occurs.

Ellis v. *M'Henry* (1871) L. R. 6 C. P. 228 is not an authority for the proposition that the principle established by *Ferguson* v. *Spencer* (1840) 1 Man. & G. 987, *Sidaway* v. *Hay* (1824) 3 B. & C. 12, and *Simpson* v. *Mirabita* (1869) L. R. 4 Q. B. 257 with regard to the effect of a discharge in bankruptcy is equally applicable to a composition by arrangement.

Substituted service of a bankruptcy petition on an officer quartered in Ireland by sending it by registered post to him at his

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father's address in London held by the Court of Appeal to be good service of the petition, the Court being satisfied on the evidence that letters so addressed were duly forwarded to and reached the debtor promptly.

APPEAL from an order for substituted service of a bankruptcy petition and from a receiving order made thereon by one of the registrars in bankruptcy.

The following statement of facts is taken from the written judgment of Swinfen Eady L.J. :—" The debtor is the eldest son of Sir William Nelson ; he was born in England, and is a lieutenant in the Army. He incurred numerous debts in England ; he was then quartered in Ireland, and incurred debts there. On May 26, 1917, he was sued in the King's Bench Division in England by the petitioning creditors, who carry on business as hosiers at 89, Piccadilly, for 162*l.* 9*s.*, being the price of goods sold and delivered between May 15, 1912, and March 17, 1915. The plaintiffs recovered judgment in default of appearance on June 18, 1917. An order had been made for substituted service of the writ by sending it by a prepaid post letter addressed to the defendant at 62, Pall Mall, London, S.W. This was defendant's father's address, and until early in the year 1916 there had been a brass place there with the words ' Sir William Nelson & Sons,' but the words ' & Sons ' were then erased, and it is denied that defendant was ever in fact a partner with his father ; indeed, Mr. Cutler Smith, the father's secretary, stated in cross-examination that it was a ' whim ' of Sir William's to have ' Sir William Nelson & Sons ' on the door-plate. However, the letter enclosing the writ appears to have reached the debtor promptly. According to Mr. Cutler Smith's evidence, letters which came for the debtor to 62, Pall Mall were sent on to him. He thinks that the debtor sent back the writ to him, as he took it to Messrs. Witham & Co., solicitors. Then on June 9, 1917, Messrs. Witham & Co. wrote to the plaintiffs' solicitors as follows : ' 9th June, 1917. Dear Sirs,—We are acting for Mr. James Nelson, against whom we understand some clients of yours have issued a writ. Perhaps you would kindly send us a spare copy if you have one. We do not propose to defend any actions by creditors, because as far as we know he has no money at all to pay anything. Yours faithfully (Signed) Witham, Roskell, Munster & Weld.' I dwell

upon the mode of substituted service of the writ, as this mode was effective to reach the defendant promptly, and a like order was made for substituted service of the bankruptcy notice and the bankruptcy petition, except that in each such case they were sent by registered post. The plaintiffs having recovered judgment served a bankruptcy notice upon the debtor by means of an order for substituted service. This notice not having been complied with, a bankruptcy petition was presented and on July 17, 1917, a similar order made for substituted service of it.

"When the petition came on for hearing on August 15, 1917, and the attention of the registrar was directed to the letter of Messrs. Witham & Co. of June 19, he adjourned the petition for a week to give the debtor a further opportunity of attending, and directed notice of the adjournment to be given by ordinary letter to the debtor and to his solicitor. On August 22 Messrs. Witham & Co. attended on the adjourned hearing representing the debtor, and stated that since the commencement of the English bankruptcy proceedings the debtor had made an application to the Court in Ireland, and that on August 18 an order had been made in bankruptcy in Ireland protecting the debtor from process until September 13, 1917. Further adjournments of the petition were granted from time to time, and ultimately on December 6, 1917, the receiving order was made."

The proceedings in Ireland were taken by the debtor under the provisions of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), as amended by the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58). As a result of these proceedings the debtor made a proposal to pay his creditors a composition of 10*s.* in the pound, which was accepted by them, and a sufficient amount to pay the composition was deposited with the official assignees. On November 30, 1917, a certificate under s. 64 of Act of 1872 was granted to the debtor by the Court.

The petitioning creditors had notice of, but did not prove in, the Irish arrangement proceedings, and had not accepted a composition.

The debtor now appealed from the order of July 17, 1917, for substituted service of the bankruptcy petition and from the receiving order of December 6, 1917.

The appeal was heard on February 1, 5, 20, 1918.

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Clayton, K.C., and *L. J. Acton Pile*, for the appellant. First, it is submitted that the order for substituted service of the bankruptcy petition upon the debtor was improper and ought to be set aside. There can be no order for substituted service of the petition out of the jurisdiction unless the Court is satisfied that the debtor is keeping out of the way to avoid service. Here the debtor was in Ireland under the command of his superior officer: Bankruptcy Rules, 1915, rr. 143, 155, 156, 158; *Fry* v. *Moore* (1); *In re Urquhart.* (2) The procedure for substituted service within the jurisdiction is not applicable to a person out of the jurisdiction unless he has gone out of it in order to avoid service.

Next, it is submitted that the receiving order was improperly made, there being no debt due to the petitioning creditor at the date of the order. The debt was discharged by the proceedings in Ireland. The old bankruptcy procedure still applies there, and under it the debtor made an arrangement with his creditors, and before the date of the receiving order he obtained a certificate from the Court which had the effect of discharging him from all his liabilities to his creditors. Bankruptcy proceedings in Ireland are regulated by the Irish Bankrupt and Insolvent Act, 1857, as amended by the Bankruptcy (Ireland) Amendment Act, 1872. The original Act applied only to traders, but by s. 17 of the Act of 1872 the distinction between traders and non-traders was abolished. By s. 343 of the Act of 1857 a trader unable to meet his engagements with his creditors may present a petition for the protection of his person and property from process until further order. By s. 344, after the granting of an order for protection, the Court shall appoint a private sitting and may direct that the petitioner's estate and effects shall be possessed and received by the official assignees and that notice of such private sitting shall be given to the creditors at such time and in such manner as the Court shall by any general or special order direct. By s. 345 the petitioner must file his account ten days before the day appointed for the private sitting. By s. 346, at the first sitting the creditors are to prove their debts and if three-fifths in number and value of those who have proved debts to the amount of 10*l.* and upwards assent to the proposal of the debtor a sitting for confirmation is appointed. By s. 347, if

(1) (1889) 23 Q. B. D. 395. (2) (1890) 24 Q. B. D. 723.

at the second sitting three-fifths in number and value of the creditors agree to accept the debtor's proposal the resolution is to be binding on all, and the Court may approve and confirm the same. By s. 349, after the approval and confirmation of the agreement all the estate and effects of the petitioner shall vest in the official assignees as if they were assignees under any bankruptcy. Then by s. 64 of the Act of 1872, so soon as the resolution or agreement by an arranging debtor shall have been carried into effect, and the creditors shall have been satisfied according to the tenor thereof, the Court shall give the debtor a certificate in the form in the schedule, C, to the Act annexed, which shall operate as a certificate of conformity under a bankruptcy, which, by s. 58, has the effect of releasing the debtor (with certain exceptions not material to this case) from all debts provable under the bankruptcy. By s. 353 of the Act of 1857, if the petitioning debtor do not attend the sittings of the Court, or if he do not file his account, his petition may be dismissed; and if at the first sitting his proposal be not assented to the Court may adjudge him bankrupt.

In this case the Acts were complied with, due notice of the proceedings being given to the petitioning creditors, and a composition of 10*s.* in the pound was actually paid to the official assignees, and a certificate in the form of Sched. C was granted to him.

[SWINFEN EADY L.J. Does this procedure bind persons out of the jurisdiction ?]

Yes. See s. 347 of the Act of 1857, whereby all persons who were creditors at the date of the petition and had notice of the several sittings are bound. The fact that notice of private proceedings for a composition are not required to be advertised does not affect the efficacy of a discharge under s. 64.

[SWINFEN EADY L.J. referred to *New Zealand Loan and Mercantile Agency Co.* v. *Morrison.* (1)]

"An adjudication in bankruptcy, followed by a certificate of discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world": per Kelly C.B. in *Gill* v. *Barron.* (2)

The effect of a certificate of conformity under a bankruptcy is to

(1) [1898] A. C. 349. (2) (1868) L. R. 2 P. C. 157, 175.

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discharge all debts whether English or Irish : *Ferguson* v. *Spencer* (1) ; *Simpson* v. *Mirabita* (2) ; *Gill* v. *Barron.* (3) A release in bankruptcy obtained by fraud is a discharge until it is set aside : *Wadsworth* v. *Pickles.* (4)

[SWINFEN EADY L.J. That was the case of an English discharge pleaded in an English Court.]

As long as the discharge stands, although obtained by fraud, it is an absolute bar to any claims by creditors. And for this purpose there is no distinction between a composition and a bankruptcy : *Flint* v. *Barnard* (5) ; *Hardy* v. *Fothergill* (6) ; *Ellis* v. *M'Henry.* (7) It is not suggested here that there was any fraud. [They also referred to the Act of 1857, ss. 129, 267, 268, and 320 ; the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 121 ; and the Rules of the Supreme Court (Ireland), Order LXXXVIII., rr. 73, 122.]

Douglas Hogg, K.C., and *G. F. Kingham,* for the respondents, were directed to confine their arguments to the question as to the effect of a certificate granted by the Court under s. 64 of the Act of 1872. A certificate under s. 64 has not, it is submitted, the effect contended for on behalf of the appellant. In *Ex parte McCulloch* (8) it was held that a sequestration in Scotland or an adjudication in Ireland did not prevent the making of an order of adjudication in England : see also *Ex parte Robinson.* (9) It is said that the respondents have been paid their debt by virtue of what happened in Ireland, and that they then had an opportunity of being paid. But a petitioning creditor is not bound to accept a tender from a debtor of the debt in respect of which he petitions : *In re Gentry* (10) ; *Brook* v. *Emerson.* (11) The fallacy underlying the argument for the appellant is that because the English Courts recognize an Irish certificate of conformity under a bankruptcy as a bar to English debts they also recognize a certificate under s. 64 as having the same effect. But it is submitted that the effect of that section is only to bar creditors of the debtor in Ireland or those of his creditors

(1) 1 Man. & G. 987.
(2) L. R. 4 Q. B. 257.
(3) L. R. 2 P. C. 157.
(4) (1880) 5 Q. B. D. 470.
(5) (1888) 22 Q. B. D. 90.
(6) (1888) 13 App. Cas. 351.
(7) L. R. 6 C. P. 228.
(8) (1880) 14 Ch. D. 716.
(9) (1883) 22 Ch. D. 816.
(10) [1910] 1 K. B. 825, 836.
(11) (1906) 95 L. T. 821.

who choose to come in under the composition arrangement. By s. 410 of the Act of 1857 it is provided that the Act shall not extend either to England or Scotland except where the same are expressly mentioned; and by s. 2 of the Act of 1872 that it shall not, except so far as the same is expressly provided, apply to England or Scotland. By s. 349 the assets of the debtor do not vest absolutely in the assignees, but only as a security for the carrying out of the composition. As was pointed out by Lord Davey in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (1), that as all the property of a bankrupt vested in his assignees or trustees, it was considered to follow that the bankrupt being denuded of his property by the English law was also entitled to plead the discharge given him by the same law. Similar reasoning applies to the case of a bankruptcy in Ireland. Here the composition of 10*s.* in the pound was provided by the debtor's father. There was therefore no denuding the debtor of his property. He still remained in possession of the 2000*l.* a year under his marriage settlement. In *Ellis* v. *M'Henry* (2), which was relied upon for the appellant, the question whether a composition had the same effect as a discharge under a bankruptcy was not decided.

[SWINFEN EADY L.J. referred to *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux.* (3)]

Further, there is this difference between a private arrangement with creditors in Ireland and an arrangement with creditors in England, that the latter is always preceded by a public examination of the debtor. Here there were in fact creditors of the debtor in England who did not receive any notice of the proceedings in Ireland.

It is submitted that a logical construction can be given to the provisions of the Irish Acts by holding that, whereas a certificate of conformity under a bankruptcy is available by the debtor against all the world, a certificate under s. 64 of the Act of 1872 is applicable only to Ireland and does not extend to England, and that such a certificate does not afford any defence to proceedings brought in England by an English creditor for a debt incurred and payable there.

Clayton, K.C., replied.

Cur. adv. vult.

(1) [1898] A. C. 349, 358. (2) L. R. 6 C. P. 228.
(3) (1890) 25 Q. B. D. 399.

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Feb. 20. SWINFEN EADY L.J. read the following judgment:— The debtor appeals from an order made on July 17, 1917, for substituted service of a bankruptcy petition, and from a receiving order made on December 6, 1917. [His Lordship stated the facts above set out, and continued:] Upon these facts I am of opinion that the contention raised on behalf of the debtor, that the order for substituted service of the petition was improper and should be set aside, cannot be supported. It was contended on his behalf that no order could be made in bankruptcy for substituted service of the petition, when the debtor was out of the jurisdiction, unless he was keeping out of the way to escape from service of process. It is true that under r. 156 of the Bankruptcy Rules, 1915, provision is made for substituted service where "the debtor is keeping out of the way to avoid such service": but the rule is not limited to that event; it provides for substituted service if "for any other cause prompt personal service cannot be effected," and r. 158 provides for service where a debtor petitioned against is not in England. Mr. Cutler Smith's evidence established that the registered letters addressed to the debtor at 62, Pall Mall were duly forwarded to him; and when the debtor's solicitors attended on the adjourned hearing of the petition they admitted the debt and the act of bankruptcy, the latter being non-compliance with the bankruptcy notice, which had been sent by registered post as authorized. There was no irregularity in the mode of service of the petition, and the order for substituted service cannot be set aside. On this point the appeal fails.

The appeal from the receiving order raises an important question. The debtor contends that the arrangement proceedings which took place in the Court in Ireland after the presentation of the bankruptcy petition in London discharged his debt to the petitioning creditors, and that at the date of the receiving order he was not legally indebted to the petitioning creditors, and that the Court had not then any jurisdiction to make a receiving order. This depends upon the true construction and effect of two Irish Statutes—the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), and the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58). The two Acts are to be construed together as one Act: Act of 1872, s. 1.

The respondents contend that the certificate given to an arranging

debtor in Ireland does not bar an English debt sued for by an English creditor in an English Court. It is provided by s. 410 of the 1857 Act that it shall not extend either to England or Scotland, except where the same are expressly mentioned; and by s. 2 of the 1872 Act that it shall not, "except in so far as same is expressly provided, apply to England or Scotland." The Act of 1857 applied only to traders as thereby defined; but the Act of 1872, s. 17, extended it to all debtors, whether traders or not, and provided that the Act was to be construed throughout as if the word "debtor" were inserted instead of the word "trader." The Acts enable an insolvent debtor to effect an arrangement with his creditors without publicity. By s. 343 of the Act of 1857, as amended, a debtor unable to meet his engagements with his creditors may present a petition to the Court, and thereupon the Court has power to grant protection to his person and property and to renew it from time to time. By s. 344 the Court is then to appoint a private sitting, and notice of this sitting is to be given to the creditors in such manner as the Court shall direct. By s. 345 the debtor is to file an account ten days before the meeting of his liabilities and assets. By s. 346 the debtor is to attend the private sitting, creditors are to prove their debts as in bankruptcy, and if a majority of three-fifths in number and value of the creditors proving whose debts amount to 10*l.* shall approve of the debtor's proposal the Court is to appoint another private sitting for confirmation of the proposal. By s. 347, if at the second private sitting a majority of three-fifths in number and value of the creditors proving confirm the debtor's proposal, it is to be reduced into writing, signed by the creditors, and, subject to confirmation by the Court, is to be binding against all persons who were creditors at the date of the petition and who had notice of the several sittings. The Court may confirm it, cause it to be filed and entered on the record, and grant to the petitioner a certificate thereof. By s. 64 of the Act of 1872, when the arrangement has been carried into effect and the creditors of the arranging debtor have been satisfied according to the tenor thereof, the Court is to give to the arranging debtor a certificate under the seal of the Court in the form in Sched. C, which is to operate to all intents and purposes as if it were a certificate of conformity under the Bankruptcy Acts. The effect of a certificate of conformity is to release a

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bankrupt from all debts provable in bankruptcy (s. 58 of the Act of 1872), with some specified exceptions.

The appellant's proceedings in Ireland under the statutes to which I have referred were regularly taken; he offered a composition of 10*s.* in the pound, the creditors accepted it, and a sufficient amount to pay the composition was duly deposited with the official assignees; and the debtor on November 30, 1917, obtained a certificate in the form of Sched. C. The respondents did not prove in the arrangement proceedings, and have not accepted the composition. The question is whether the English judgment debt must be regarded as released and discharged by these Irish proceedings when it is sought to enforce it by proceedings in England. The question would have been the same if instead of proceedings in bankruptcy the petitioning creditors had seized under a fi. fa. chattels in England of their debtor after the date of the certificate in the form of Sched. C.

The statutes to which I have referred are Acts of the Parliament of the United Kingdom, but whether they extend to bind English creditors when their rights are in question in English Courts depends upon their construction. The contracts upon which the petitioning creditors sued were contracts made in England and to be performed in England. Because English creditors may be bound by Irish bankruptcy proceedings it by no means follows that they are bound by a composition arrangement.

In *Armani* v. *Castrique* (1) it was said by Pollock C.B. that an English certificate is a discharge as against all the world in the English Courts, and he added: "The goods of the bankrupt all over the world are vested in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here." This reasoning has no application to the question now under consideration. In the present case there was not any divesting of any property of the debtor; his title to any land or goods was not affected. Indeed, there is a much greater difference between bankruptcy and a composition arrangement under the Irish Acts than between the bankruptcy of an individual and the winding up of a company. It was held by the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (2) that

(1) (1844) 13 M. & W. 443, 447. (2) [1898] A. C. 349, 358.

the Joint Stock Companies Arrangement Act, 1870, the provisions of which are in terms expressed to extend to all creditors, only so extended when their rights were in question in the Courts of the United Kingdom, and not when proceedings were taken in a Colony. Lord Davey pointed out the distinction between bankruptcy and winding up, and explained the principle upon which an English discharge in bankruptcy could be pleaded as a defence in a Colonial Court. He said: "It has been decided that by the express words of the Bankruptcy Acts all the property real and personal of an English bankrupt in the Colonies as well as in the United Kingdom is vested in his assignees or trustees. Their title must therefore receive recognition in the Colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law. But how does this assist the appellants? We have to deal with the winding up of a company not with bankruptcy, and there is a material distinction between the effect of bankruptcy and that of winding up. In the former case the whole property of the bankrupt is taken out of him, whilst in the latter case the property remains vested in title and in fact in the company, subject only to its being administered for the purposes of the winding up under the direction of the English Courts."

Again, when the provisions of the Irish Acts are carefully considered it will be noticed that as much care is taken to ensure publicity in bankruptcy proceedings as is taken to ensure privacy in a composition arrangement. There are no advertisements in the latter proceedings of any kind. Both the sittings are expressly referred to as "private sittings"; and r. 126, which provides for notices to the creditors, in terms excludes notice in the *Gazette*. Again, by s. 57 of the Act of 1872, in the case of bankruptcy, notice of the allowance of the certificate of conformity is to be advertised in the *Dublin Gazette*. But although an arranging debtor, who has carried out his arrangement, is entitled under the Act of 1872 to a certificate in the form of Sched. C, which by s. 64 is to operate "to all intents and purposes as if the same were a certificate of conformity under a bankruptcy," yet the allowance of this certificate is not directed to be advertised in any way.

The effect of a certificate of conformity in bankruptcy is to

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discharge the bankrupt from all debts provable in bankruptcy, with some specified exceptions—s. 58 of the Act of 1872; and even though the name of the creditor may have been omitted from the list of creditors, and accordingly may have had no actual notice of the proceedings—*Edwards* v. *Ronald* (1) and *Elmslie* v. *Corrie*. (2) But, having regard to the provisions of s. 347 of the Act of 1857, limiting the effect of an arrangement to creditors who have received notice of the several private sittings, it cannot have been intended, notwithstanding the wide language used, that a certificate in the form of Sched. C is to operate in England, as if it were a certificate of conformity under a bankruptcy, so as to bar an English creditor who may have had no knowledge or means of knowledge of the proceedings. Some limit must therefore necessarily be placed upon the meaning of s. 64 of the Act of 1872. It must be remembered that the Acts under consideration are not to apply to England or Scotland except so far as expressly provided. There is no express provision that a certificate in the form of Sched. C which is not a certificate of conformity is to have the effect of such a certificate in England. The language of the statute is satisfied if it has that effect in Ireland.

In *Sidaway* v. *Hay* (3) a Scottish trader contracted a debt in England and afterwards obtained a discharge under a Scottish sequestration, and it was held that the claim of the English creditor was thereby barred in an English Court; but that result was only arrived at after a detailed examination of the provisions of the statute; all the property of the bankrupt of every kind and wherever situate was taken from him for payment of his debts, and on important occasions notices were required to be given in the *London Gazette* as well as in the *Edinburgh Gazette*, and Abbott C.J., in delivering the judgment of the Court, said that the Legislature would not have required these notices unless it had been intended that the discharge should operate upon English as well as Scottish creditors.

The appellants relied upon *Ellis* v. *M'Henry* (4), where a Canadian creditor sued in England a debtor who had in England compounded under the English Bankruptcy Act; the action was founded in

(1) (1830) 1 Knapp, 259.
(2) (1878) 4 Q. B. D. 295.
(3) 3 B. & C. 12.
(4) L. R. 6 C. P. 228.

part on a Canadian judgment recovered after the composition deed, and in part upon another cause of action which had accrued prior to the composition. It was held that, with regard to the Canadian judgment, the composition deed afforded no answer, as if it were a defence to the debt it should have been pleaded in the Canadian Court, and it was too late to raise it after judgment. With regard to the other cause of action, the English composition deed was an answer to the claim in an English Court. The decision of the case on both points was correct. There are dicta which go further, but the case cannot be relied upon as an authority on these other points, as the essential difference between a bankruptcy and a composition was not relied upon, nor was the point argued; indeed, the counsel for the plaintiffs commenced his argument by stating that the principal question was whether an English bankruptcy was any answer to an action on a Colonial debt, for it could hardly be contended that the rules respecting bankruptcy and composition deeds were different. This case was referred to in the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (1), and the only comment upon it made by Lord Davey was that their Lordships were not called upon to criticize the decision in *Ellis* v. *M'Henry* (2), which in their opinion did not apply to the case then before them.

The conclusion at which I have arrived is that, according to the true construction of the Irish Acts, the provision that the certificate in the form of Sched. C is to have the effect of a certificate of conformity is applicable to Ireland but does not extend to England, and that such a certificate does not afford any defence to proceedings brought in England by an English creditor for a debt incurred and payable here.

The appeal from both orders should be dismissed.

BANKES L.J. read the following judgment:—The only substantial question raised by this appeal is whether the effect of a certificate granted by the Court of Bankruptcy in Ireland to an arranging debtor under s. 64 of the Bankruptcy (Ireland) Amendment Act, 1872, is to discharge the debtor from a debt incurred in England and sought to be enforced in the English Courts.

(1) [1898] A. C. 349, 358. (2) L. R. 6 C. P. 228.

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The material facts are as follows. The petitioning creditors commenced an action against the debtor in the King's Bench Division in England, claiming 162*l.* 9*s.* as the price of goods sold and delivered. No appearance having been entered, judgment was signed on June 18, 1917. A bankruptcy notice was served upon the debtor on June 23, and a bankruptcy petition was presented on July 12. The date fixed for hearing the petition was August 15. As the debtor did not attend on that day, the petition was adjourned until August 22. Meanwhile other creditors of the debtor, who was then quartered in Ireland, had commenced proceedings against him there, and a judgment had been obtained against him on July 16, 1917, in the King's Bench Division in Ireland for 372*l.* On August 17, 1917, the debtor filed a petition for protection in the Bankruptcy Court of Ireland under the provisions of the Bankrupt and Insolvent Act (Ireland), 1857, and the Bankruptcy (Ireland) Amendment Act, 1872. As a result of these proceedings in Ireland the debtor made a proposal for a composition which was accepted by the creditors, and on November 30, 1917, a certificate under s. 64 of the Act of 1872 was issued by the Court. Pending these proceedings in Ireland the hearing of the bankruptcy petition in the Bankruptcy Court in England had been adjourned from time to time, and it came on for hearing in December, 1917. It was then contended for the debtor that he had been released from the debt upon which the petition was founded by the certificate which had been issued by the Court of Bankruptcy in Ireland. The learned registrar refused to accept this contention and made a receiving order against the debtor; hence the present appeal.

The case made for the appellant rests upon the contention that a discharge by a Court of Bankruptcy granted under an Imperial statute is a discharge against all the world in any British Court. As a proposition of law I think that the contention is sound. It is so stated in Halsbury's Laws of England, vol. 2, p. 270, par. 450. It is included in the third proposition laid down by Bovill C.J. in *Ellis* v. *M'Henry* (1), and it is well illustrated in relation to Scotland and Ireland by four cases which were decided between the years 1819 and 1828. In *Philpotts* v. *Reed* (2) the defendant pleaded a certificate of discharge as an insolvent obtained from the New-

(1) L. R. 6 C. P. 228, 234. (2) (1819) 1 Brod. & B. 294.

foundland Courts under the statute 49 Geo. 3, c. 27, in bar to an action in England for a debt contracted in England prior to the insolvency. The Court allowed the plea. In that case the words of the statute were so plain as to admit of no doubt. In *Lewis* v. *Owen* (1) and in *Phillips* v. *Allan* (2) the Court refused to recognize a discharge under an Irish commission of bankruptcy, or a discharge of a debtor under a cessio bonorum by the Court of Session in Scotland, as discharging a debt contracted in England and sued for in England. In *Sidaway* v. *Hay* (3) the Court held that a debt contracted in England by a trader residing in Scotland is barred by a discharge under a sequestration issued in Scotland in conformity to the statute 54 Geo. 3, c. 137. This is an instructive case. A great deal of the language and reasoning of Abbott C.J. is directly applicable to the question which this Court has to determine. The Chief Justice sums up his view of the principle which is applicable where he says: "and then, it being clear that the bankrupt is deprived of all his property for the benefit of all his creditors who choose to partake of the distribution of it, by an Act of a Legislature having authority over all parts of the United Kingdom, justice seems manifestly to require that no one who may partake of the benefit, should be allowed to sue the debtor, whose all has been thus given up, if by accident he may happen to meet with him in England. And, therefore, we think we ought not to narrow the effect of the language of the sixty-first section, but to give to the phrase, 'all his debts,' the meaning usually and ordinarily belonging to those words." Lord Davey in the case of *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (4) adopts the same reasoning in explaining why a discharge under the English bankruptcy law operates to discharge a debtor in the Colonies from a debt incurred there. He says: "it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law."

There is no question that the two Acts of Parliament which have to be interpreted are Imperial statutes. Both expressly provide that, except in so far as the same is expressly provided, they shall not apply to England or Scotland. As was pointed out in the case of *Ferguson*

(1) (1821) 4 B. & Al. 654.
(2) (1828) 8 B. & C. 477.
(3) 3 B. & C. 12, 22.
(4) [1898] A. C. 349, 358.

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v. *Spencer* (1) by Tindal C.J., this provision has no material bearing upon the question which we have to decide, as both the statutes in question contain plenty of material evidence that they are intended to apply to the assets and property in England of debtors proceeded against in Ireland under the provisions of these statutes. I take it for granted that a certificate of conformity granted by the Court of Bankruptcy in Ireland to a debtor who had been adjudicated bankrupt there would operate to discharge such debtor from a debt incurred in England and sued for in England. The question which has to be decided in this appeal is whether the same result should follow in the case of a certificate granted under s. 64 of the Act of 1872 after proceedings taken under the very special procedure created by s. 343 and the following sections of the Act of 1857 (as amended by the Act of 1872) under the name of a petition for protection. Under this procedure the debtor presents his own petition claiming protection from process (s. 343). If an order is granted the Court appoints the first private sitting, and if it thinks fit directs that the estate and effects of the petitioner shall be possessed and received by the official assignees (s. 344). The petitioner must file in Court a full account of his debts and of his estate and effects (s. 345). If at the first sitting the prescribed proportion of creditors assent to the petitioner's proposal, a second private sitting is appointed by the Court for the confirmation of the proposal (s. 346). At the second private sitting, if the creditors agree to accept the proposal, the terms are reduced into writing and signed by the creditors (s. 347). The section then proceeds: "And such resolution or agreement, subject to such confirmation as hereinafter mentioned, shall thenceforth be binding and of full force as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings." The confirmation is by the Court itself. Sect. 349 is important. It provides: "From and after the date of the approval and confirmation of such resolution or agreement, all the estate and effects of such petitioning trader shall vest in the official assignees (if such shall be required by virtue of such resolution, and either alone or jointly with any person or persons, as may be expressed in such resolution), as fully as if such official assignees

(1) 1 Man. & G. 987, 1000.

and other parties were assignees under any bankruptcy." Sect. 352, which dealt with the certificate which might be granted to an arranging debtor, was repealed by the Act of 1872, s. 64 of which Act provides that, as soon as the resolution or agreement shall have been carried into effect and the creditors have been satisfied, the Court shall grant the petitioner a certificate, which " shall thenceforth operate to all intents and purposes as if the same were a certificate of conformity under a bankruptcy." The effect of a certificate of conformity is under s. 58 of the Act of 1872 to release the debtor (with certain exceptions which are not material) " from all other debts provable under the bankruptcy." The first question which arises upon these sections and this procedure is, Do the statutes when speaking of the debts of the petitioner (s. 345) and of his estate and effects (ss. 344, 345, and 349) include debts due in England to English creditors and estate and effects situate in England and elsewhere? In my opinion they do, and to this extent the reasoning of Abbott C.J. and Lord Davey to which I have already referred applies. There are two features of this procedure, however, which require special consideration, and upon which, in my judgment, the decision in the present case must turn. The first is that the resolution of the creditors, by the express terms of s. 347, binds only such creditors as had notice of the several sittings. The certificate granted under s. 64 of the Act of 1872 cannot, therefore, in spite of the general language of s. 58, operate as a general release of the debtor from all his debts. The second, and equally important, is that the procedure contemplates and permits proposals by a petitioner being accepted and acted upon under which the estate and effects of the petitioner are never surrendered by him at all. The present is one of those cases. For the purpose of considering the construction to be placed upon the statutes it is immaterial that the petitioning creditors in the present case had notice of the sittings, and it is equally immaterial that the petitioner is stated to have had no available assets. The question is whether the Legislature, by providing for this method of private arrangements with creditors with the assistance of the Court, intended by the language it used to release a debtor from all debts or only from such debts as creditors should seek to enforce in the Courts of Ireland. I think that the question is not free from difficulty, but the conclusion at

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which I have arrived is that the language of the statute is not sufficiently definite to justify so sweeping a construction as is contended for by the appellant. For these reasons the appeal, in my opinion, fails.

EVE J. read the following judgment:— The only point of substance in this appeal is the question whether the certificate given to the debtor under s. 64 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), operates in England in the same way as it does in Ireland to release the debtor from the debts of creditors in this country who had notice of the two private sittings whereat the resolution or agreement to accept a composition of 10*s.* in the pound was assented to and signed. The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), and the amending Act of 1872 do not extend to England or Scotland "except where the same are expressly mentioned," and as no express mention is made either of England or Scotland in s. 64 or in any of the sections of the 1857 Act providing for this particular mode of liquidation by arrangement, the operation of the whole procedure is prima facie limited to Ireland.

But an argument on behalf of the appellant has been developed on these lines. By s. 64 it is enacted that the certificate therein provided for shall "operate to all intents and purposes as if the same were a certificate of conformity under a bankruptcy." Under the combined effects of the Acts of 1857 and 1872 the position of a bankrupt who has been allowed a certificate of conformity is practically the same as that of a bankrupt who in this country has obtained an unconditional order of discharge; with certain exceptions, common to both countries, the bankrupt is released from all debts provable in the bankruptcy. In this country the certificate of conformity is recognized as a good defence to an action brought to recover an English debt provable in the bankruptcy; therefore it is said the certificate under s. 64 having the same statutory efficacy must equally be treated as a good defence.

The statement as to the effect given in this country to the certificate of conformity is no doubt accurate, but whether that fact leads to the results to which the arguments would carry it is a very different matter. In dealing with this aspect of the case we have to consider

the grounds upon which the certificate of conformity has been treated as a good defence to an action on a debt contracted in this country and provable in the Irish bankruptcy, to examine how far those grounds are common to a bankruptcy and to this method of private arrangement, to ascertain whether there is any authority establishing or tending to establish generally that releases in insolvency proceedings not involving sequestration or bankruptcy are to be regarded as having quite the same force and effect as a discharge in bankruptcy, and finally, if there be no such authority, to determine whether this particular certificate ought to have the same effect given to it here as is given to the certificate of conformity.

In these matters we are not concerned with any question of international law. A release in a strictly foreign bankruptcy equivalent to a discharge in bankruptcy according to our law is no answer to an action here upon an English contract. The effect given in this country to the certificate of conformity in an Irish bankruptcy is brought about by the construction of the Irish Bankruptcy Acts. Being Acts of the Imperial Parliament, they are construed for this purpose as the law of the country in which the contract was made, and this is founded, according to all the authorities, upon the necessity for avoiding the inconsistency, and indeed injustice, of divesting the debtor of all his property wherever located for division amongst all his creditors wherever resident and at the same time leaving him exposed to the claims of local creditors outside the jurisdiction where the bankruptcy occurs.

Does the same necessity arise or do the same grounds exist in insolvency proceedings not involving bankruptcy? It is true that in private arrangements of the kind with which we are here dealing the resolution may provide for the vesting of the whole of the debtor's property in the assignee either alone or jointly with another or others, but this is brought about by its being embodied in the original or amended scheme proposed by the debtor. It is quite unlike the divesting which follows sequestration or adjudication, and indeed is no more than the transfer of the debtor's property by way of security for the carrying out of the scheme of arrangement, as is made clear by s. 65 of the Act of 1872, which provides for a revesting of the estate in the debtor on fulfilment by him of the terms of the arrangement. In all the cases in which the instrument

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of discharge in the foreign bankruptcy has been upheld as a defence to an action in this country on a debt provable in the bankruptcy it will be found that the foreign bankruptcy (and I am here, of course, using the word " foreign " in a restricted sense) has involved the complete divesting of the debtor of his whole estate for the benefit of creditors generally. Such was the result in *Ferguson* v. *Spencer* (1), in *Sidaway* v. *Hay* (2), and in *Simpson* v. *Mirabita* (3), and the only case which might appear to support the appellant's contention that the principle of these decisions is equally applicable to a composition by arrangement is *Ellis* v. *M'Henry* (4); but that is really no authority for the proposition. The point was not involved in or dealt with by the judgment there, and the only reference to the matter is to be found in counsel's argument, wherein he is reported to have said that it could hardly be contended that " the rules respecting bankruptcy and composition deeds are different." I think they are essentially different in these respects, that whereas in the one all the property of the debtor of every kind and wherever situate is taken from him for payment of his debts, and creditors wherever resident may prove their debts and receive their share of the estate, in the other no such consequences necessarily follow, and whereas in bankruptcy the discharge (subject to the statutory exceptions) is a release from all debts, in a composition of the kind we are here dealing with assenting creditors, or at most only those who have had notice are bound. In my opinion it is these fundamental distinctions which make the rules applicable to the former and not to the latter. As a result of all the authorities I think the rule can properly be stated as follows, still using the word " foreign " in its restricted sense : " Where the effect of the foreign bankruptcy is to divest the debtor of the whole of his property wherever situate and to vest it in the assignee for distribution amongst all his creditors wherever resident, the Courts in this country give the same effect to the order or instrument discharging the debtor in the bankruptcy as is given to it in the country where the bankruptcy occurs."

If such be a correct and exhaustive statement of the rule, it is obvious that no room is left for accepting the submission that the certificate under s. 64 ought to be treated as of the same force and

(1) 1 Man. & G. 987.
(2) 3 B. & C. 12, 22.
(3) L. R. 4 Q. B. 257.
(4) L. R. 6 C. P. 228, 230.

effect as an unconditional discharge ; but great reliance was placed upon the fact that under arrangements of this nature a divesting may take place, and the resolution may involve the realization of the whole of the debtor's estate for the benefit of his creditors. A voluntary surrender of the estate as the consideration for a release by the creditors is in my opinion so essentially different from the compulsory divesting which ensues on bankruptcy as to afford no reason, or at any rate no sufficient reason, for holding that the same consequences must flow from the one as from the other ; but, apart altogether from these considerations, I think that the real answer to the contention that this certificate is one to which the rule ought to be extended is that which has already been pointed out, namely, that so to extend the rule would result in barring the remedy here of creditors who never had any notice of the private sittings and the resolution come to thereat, and who under the Irish Acts are consequently not bound by the proceedings. In other words, we should be giving to the certificate a greater force in this country than it has in Ireland.

I agree in the conclusion that the appeal fails and ought to be dismissed.

Appeal dismissed.

Solicitors : *Witham, Roskell, Munster & Weld ; W. Wallace Harden.*

W. I. C.

1918
Jan. 11.

PYMAN STEAMSHIP COMPANY *v.* LORDS COMMISSIONERS OF THE ADMIRALTY.

Shipping—Charterparty—Requisition of Ship by Admiralty—Breaking of Propeller Shaft—Danger from Minefields—Payment for Salvage Services—Liability of Admiralty for Contribution—Marine Risk—War Risk.

The Admiralty requisitioned a steamship upon the terms of a charter under which they were not to be liable for loss or injury caused by sea risk; the risks of war which were taken by the Admiralty were those risks excluded from an ordinary policy of marine insurance by an f. c. & s. clause. The steamship while on a voyage in the North Sea broke her propeller shaft and became disabled. A strong gale was blowing at the time, and she was driven by the wind, tide, and sea towards some German minefields about six miles away. Salvage services were rendered to the disabled steamship by another vessel, which eventually towed her into port. The owners of the steamship claimed that the sum paid in respect of those salvage services should be divided between the marine underwriters and the Admiralty:—

Held, that, inasmuch as the Admiralty had contracted with the owners of the steamship to pay if the vessel sustained injury from a war risk, and as the steamship was in imminent danger of sustaining injury from a war risk and had been saved from that peril, the Admiralty were liable to contribute in respect of those salvage services.

Award in the form of a special case.

The steamship *Raithwaite*, belonging to the Pyman Steamship Company (hereinafter called "the owners"), was requisitioned by the Admiralty upon the terms contained in Charter T. 99. Clause 18 provided: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—'Warranted free of capture, seizure, and detention, and the consequences thereof, or of

any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.' . . . ."

On February 17, 1915, the *Raithwaite* broke her propeller shaft whilst on a voyage from Rotterdam to the Tyne, and was thereby disabled. At that time a gale was blowing from the S.S.W., and the *Raithwaite* was in a position between two minefields, being driven by the wind, tide, and sea towards certain German minefields which were about six miles north of where she was. Efforts were unsuccessfully made to repair the shaft, and during that time a submarine, supposed to be German, passed about one mile to the north, but took no notice. Salvage services were rendered by the *Caledonia*, which endeavoured to tow the *Raithwaite* in a south-westerly direction to a safe port or anchorage in England; but as both vessels were only driving towards the German minefields a course was shaped towards the Dutch coast, the wind and sea both increasing rapidly until a gale was blowing, with squalls and heavy sea. While the *Caledonia* was endeavouring to tow the *Raithwaite* a buoyant mine passed the *Raithwaite* about twenty yards from her stern.

A claim having been made on behalf of the *Caledonia* for salvage services, the owners paid the salvors in settlement of their claim the sum of 3000*l.*, which sum was admitted by the Admiralty to be a reasonable amount. The owners claimed that this sum of 3000*l.* should be divided equally between their ordinary underwriters and the Admiralty, as both the salved and the salving vessels were in more danger owing to the risk of minefields than the ordinary risks which were likely to accrue during the performance of the salvage services. The Admiralty contended that they were not liable for any portion of the sum paid in respect of salvage services, as the vessel had not been actually injured by a war risk. By agreement, the question whether the salvage should be divided, as contended by the owners, was referred to arbitration.

The arbitrator found as a fact that the *Raithwaite* as she lay at anchor disabled, besides being exposed to the ordinary sea perils, was in danger of driving on to one or other of the minefields if her anchors failed to hold, and that the danger from drifting mines and enemy submarines was accentuated by the fact that the *Raithwaite*,

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being unable to steam, was compelled to remain in a danger zone, offering an easy target for the enemy, until she was towed into safety by the salvors. Taking those matters into consideration, the arbitrator found that 750*l.* out of the total sum of 3000*l.* paid for salvage might properly be treated as representing the amount by which the salvage reward payable to the salvors was enhanced or increased by reason of war risks to which the salved vessel was exposed, and from which she was rescued by the salvors. He also found that the master of the *Raithwaite*, in accepting the services of the salvors, did so with the object of saving his vessel both from marine and war risks, that 750*l.* was a reasonable sum for the owners to have paid for rescuing the vessel from such war risks, and that those war risks were " consequences of hostilities and warlike operations " within clause 19 of Charter T. 99.

Subject to the opinion of the Court, the arbitrator awarded (*a*) that clause 19 of Charter T. 99 was not a contract of marine insurance, and that there was no partial loss of the subject-matter insured, and that there was no liability upon the Admiralty Commissioners as underwriters or insurers of the *Raithwaite* to contribute to the amount of salvage paid by the owners in respect of the salvage services ; (*b*) that, treated as a contract by charterparty, there was a duty on the owners and master of the *Raithwaite* to do what was reasonably necessary to protect the charterers from their liability under clause 19 of the charterparty, and that as the master was apprehensive of the dangers to his ship arising in consequence of hostilities or warlike operations as well as from marine risks, and took assistance to avert the consequences, not only of the marine, but also of the war risks, he was rightly performing his duties to the charterers, and the Admiralty Commissioners as charterers were liable in law to indemnify the owners against the reasonable expenses or liability so incurred, and these the arbitrator assessed at the sum of 750*l.* ; (*c*) that the Admiralty as charterers were under a liability to the owners to pay to them the sum of 750*l.* as being a reasonable sum incurred and paid by the owners for the purpose of safeguarding the vessel from loss or injuries from war risks which were reasonably apprehended.

The question for the opinion of the Court was whether the award was right.

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C. R. Dunlop (*Sir Gordon Hewart, S.-G.*, with him), for the Admiralty Commissioners. There is no liability upon the Admiralty Commissioners under clause 19 of Charter T. 99 to contribute towards the sum paid in respect of the salvage services rendered to the *Raithwaite*. No action could have been brought against them by the salvors. The *Raithwaite* became disabled and was in danger of being driven on shore in consequence of bad weather, and clause 18 expressly provides that the Admiralty shall not be liable in that event, the owners remaining liable for sea risks. The liability of the Admiralty is limited by clause 19 to an actual loss or injury to the ship arising by war risk; the clause does not impose upon the Admiralty any liability to contribute towards reasonable expenses paid to avert a possible loss or injury arising by war risk. The Admiralty have by that clause undertaken a lesser liability than if they had been ordinary underwriters on a war risks policy; they would not have been liable even if there had been no sea risk in operation and the only imminent danger had been that of running on to minefields owing to the breakdown of the steering gear. Even if the Admiralty have by clause 19 undertaken the same liability as underwriters on a war risks policy, still they are not liable in the present case, because underwriters on a marine policy with an f. c. & s. clause would be held liable for the loss as being a loss by perils of the sea, and they could not claim a contribution of 750*l.* from the war risks underwriters on the ground that the loss had been by a war risk. A salvage award paid in respect of one casualty is an indivisible sum. The services rendered to the *Raithwaite* would have been the same even if there had been no war in progress; the only effect of the war was to increase the amount paid for salving the *Raithwaite* from the sea risks. The *Raithwaite* had not drifted on to the minefield; the services of the *Caledonia* were obtained in consequence of the apprehension of that peril by the master of the *Raithwaite* and of his desire to avoid it. The case is similar to *Becker, Gray & Co.* v. *London Assurance Corporation* (1), where the House of Lords held that the loss was not due to a peril insured against but to the voluntary act of the captain in going into a port in order to avoid the peril. In this case the war risk was not the proximate cause of the salvage, although it was an inducing

(1) [1918] A. C. 101.

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cause. The master was under no duty to the charterers to obtain assistance.

R. A. Wright, K.C., and *Balloch*, for the Pyman Steamship Company. The general rule as to the incidence of the burden of the salvor's claim upon the salved property is that every interest in that property which is benefited by the salvage services contributes to the salvage award: Kennedy on Civil Salvage, 2nd ed., p. 202. The interest which the Admiralty had under clause 19 of this charterparty is sufficient to put upon them an obligation to contribute to the salvage award. Salvage is a measure for averting loss, and the question in regard to the liability for such services is totally different from the question of proximate loss under a policy of insurance, which was the question in *Becker, Gray & Co.* v. *London Assurance Corporation*. (1) The award for the salvage services rendered to the *Raithwaite* was against the owners in respect of sea risks, but against the Admiralty in respect of war risks. Sir James Hannen in the *Five Steel Barges* (2) said that the right to sue in personam "exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security." He also said that the right to salvage "is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property." Those passages were cited with approval by Sir F. Jeune P. and by Lord Alverstone C.J. in *The Cargo ex Port Victor*. (3) Clause 19 is an agreement by the Admiralty to indemnify the owners of the *Raithwaite* against loss which would be excluded from an ordinary policy of marine insurance by an f. c. & s. clause. There is implied in that agreement an obligation by the Admiralty to pay for services whereby they are saved from liability for such risks.

[BAILHACHE J. In *Ruabon Steamship Co.* v. *London Assurance* (4) the House of Lords held that there is no principle of law which

(1) [1918] A. C. 101.
(2) (1890) 15 P. D. 142, 146.
(3) [1901] P. 243, 247, 256.
(4) [1900] A. C. 6.

requires a person to contribute to an outlay merely because he has derived a material benefit from it.]

In the present case there is a finding that the salvage award was paid not only for salving the ship from marine perils but also from war risks. The award was enhanced by reason of the proximity of war perils; it ought, therefore, to be apportioned as was done in the case of *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1) and *The Harersham Grange.* (2) The present case is much stronger than either of those cases.

C. R. Dunlop replied.

BAILHACHE J. The question whether or not the Admiralty Commissioners are liable to pay any portion of the sum of 3000*l.* paid to the salvors of the *Raithwaite* in respect of the salvage services rendered to her depends, in my opinion, upon the construction to be put upon clauses 18 and 19 of Charter T. 99. It is quite true that the salvage award is as regards the salvors an indivisible sum, but that does not, in my opinion, dispose of the question, because the further question still remains how the incidence of that sum is to be borne as between the two parties to this charterparty.

It is said, and I think quite truly, that in these days any vessel which incurs a sea peril in the North Sea also incurs in a greater or less degree a war risk peril at the same time. In the North Sea at the present time there is always a danger from minefields and submarines. One of the best ways, perhaps almost the only way, that a vessel can hope to escape from the submarines is by reason of her power of motion. The *Raithwaite* had lost altogether all power of motion; therefore, even if there had been no minefields in the immediate proximity, it is quite clear that the *Raithwaite*, having broken down, was exposed not only to sea perils but also to some risk of war perils. I have no doubt that the fact that vessels which break down at the present time in the North Sea are exposed not only to sea perils but also to war perils is taken into account when salvage awards are made. Not only are disabled vessels subject to war perils as well as to marine perils, but the salvors themselves in coming to the assistance of such vessels also incur serious war risks. If in the present case there had only been that general danger from

(1) (1886) 11 App. Cas. 573. (2) [1905] P. 307.

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war risks to be taken into account, I should have come to the conclusion that the whole of the salvage award of 3000*l.* would have to be borne by the owners of the *Raithwaite*, and by them alone. But those are not the facts in the case before me. There was not only the general danger from war risks which all vessels which break down in the North Sea incur at the present time, but the *Raithwaite* was also in imminent danger of drifting on to a minefield, and she was saved from that particular risk by the salvors in this case. Suppose that the only risk to which the *Raithwaite* had been subject was the risk of drifting on to one of these minefields, suppose also that no sea peril at all had been in operation, and suppose, further, that an award of 750*l.* had been made to the salvors who had salved her from that risk, would the shipowners or the Admiralty Commissioners have to pay that sum? Mr. Dunlop has urged that under clause 19 such a payment would have to be borne by the shipowners unless the *Raithwaite* had in fact drifted so far as to come into actual contact with one of the mines on this minefield and had suffered injury from the explosion of the mine. I cannot accept that contention. It seems to me that if once a vessel is in imminent danger of drifting on to a minefield, and she is relieved from that position of imminent danger through salvage services rendered to her, then in effect she is brought within clause 19 of the charterparty. It cannot, in my view, be necessary in circumstances like that, in order to bring her within clause 19, that she should have to drift on to a minefield and to sustain injury from an exploding mine before the Admiralty Commissioners become liable to pay. It is quite true that in this case it was a peril of the sea which caused the war peril to come into operation, but that does not seem to me to be material. This is not an action on a policy of insurance, and the questions of causa proxima and causa remota do not arise; I have to deal with the facts as I find them.

I should like to add that I do not regard the Admiralty Commissioners as insurers in this case; they are not underwriters. I regard them simply as persons who have made, not an insurance contract, but an ordinary time charter contract in the form of clause 19 of this charterparty. Nor do I accept Mr. Wright's argument—at any rate, not in its entirety—that the Admiralty Commissioners are liable because they have derived a benefit from

the salvage services rendered to the *Raithwaite*. Many persons derive benefits from salvage services who cannot be made liable to pay salvage awards in respect of such services either in a direct action by the salvors, or in an indirect action by the owners of the res salved who have had to pay the award and who seek to recover it from persons who have derived a benefit from the salvage services. If one is to treat the Admiralty Commissioners as liable on the ground that they have derived a benefit from these salvage services, one would have to hedge about the class of persons who are so liable by a great number of restrictions. I prefer to base my decision upon the ground that the Admiralty Commissioners have entered into a contract with the owners of the *Raithwaite* that if the vessel suffers injury from a war risk peril they will pay. It seems to me that if the Admiralty Commissioners were liable to pay if the *Raithwaite* had actually sustained injury from a war peril, they are equally liable to pay salvors who came to the rescue of the *Raithwaite* and by their services prevented the *Raithwaite* suffering injury from an imminent war peril.

The amount of the award has not been challenged. The result is that the award for 750*l.* stands.

Award upheld.

Solicitor for Admiralty Commissioners: *Treasury Solicitor.*

Solicitors for Pyman Steamship Company: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

R. F. S.

1918
Feb. 5, 6.

ASHTON & CO. *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Carrier—Carriage of Goods—Value and Nature of Goods not declared—Transit partly by Land and partly by Sea—Loss of Goods—Onus of Proof—Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *s.* 1.

Three packages of furs, each of which was above the value of 10*l.*, were delivered by the plaintiffs to the defendants for carriage from London to Belfast, part of the transit being by land and part by sea. The plaintiffs made no declaration as to the nature and value of the goods, as required by s. 1 of the Carriers Act, 1830. The goods could not be traced beyond Euston Station, but there was no evidence as to when or where they were lost. The defendants relied upon s. 1 of the Carriers Act, 1830, as a defence to an action by the plaintiffs for the value of the goods:—

Held, that the plea of the Carriers Act was not a good answer to the plaintiffs' claim for breach of contract for the carriage of the goods both by land and sea, inasmuch as that Act only afforded protection to the carrier where the goods were lost by land, and the defendants had failed to show that the goods were lost during the land portion of the transit.

Appeal from the Bloomsbury County Court.

The plaintiffs in September, 1916, delivered to the defendant railway company at their receiving office in Knightrider Street three packages of fur coats for carriage from London to Belfast, part of the transit being by land and part by sea. The plaintiffs made no declaration as to the value and nature of the goods, as required by s. 1 of the Carriers Act, 1830. (1) The parcels were taken by the

(1) Carriers Act, 1830, s. 1: "No . . . . common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say) . . . . furs . . . . contained in any parcel or package which shall have been delivered, ... to be carried for hire . . . . when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such . . . . common carrier . . . . for the purpose of being carried . . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

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defendants from the receiving office to Euston Station, but they could not be traced beyond the departure platform at that station. There was no evidence as to when or where the goods were lost.

The plaintiffs sued the railway company to recover 65*l.*, the value of the furs. The defendants gave notice that they relied upon s. 1 of the Carriers Act, 1830, as a defence to the action. It was not disputed by the plaintiffs that the Carriers Act applied to protect the defendants if the goods were lost during the portion of the transit by land, but they contended that the onus lay upon the defendants, if they relied upon the statute, to show that the loss occurred during that portion of the transit. The defendants, on the other hand, contended that the onus lay upon the plaintiffs to show that the loss occurred by sea.

The county court judge held that the onus lay on the defendants to show that the loss occurred during the portion of the transit by land, and that as they had failed to discharge that onus they were not entitled to the protection of the Carriers Act, 1830, and he accordingly gave judgment for the plaintiffs.

The defendants appealed.

Schiller, K.C., and *Russell Davies*, for the defendants. The county court judge was wrong in holding that the onus lay upon the defendants to show that the loss of the furs occurred on land. The scheme of the Carriers Act, 1830, is that if the carrier establishes that he is a common carrier by land and exhibits the notice required by s. 2 of the Act he is protected, and the fact that he also carries by sea does not deprive him of that protection. The Act is framed, not to protect a particular transit, but a carrier by land: *Le Conteur* v. *London and South-Western Ry. Co.* (1) In that case it was in effect laid down by Lush J. that the carrier was protected both in respect of the carriage by land and the carriage by sea. Unless the sender of goods within the description dealt with by the Act declares their nature and value he cannot recover against the carrier for their loss. Even if the carrier is not protected by the Act of 1830 in respect of the carriage by sea, the onus is still on the plaintiffs to establish that the goods were lost during that portion of the transit, because it is equally probable that the loss occurred by land or by

(1) (1865) L. R. 1 Q. B. 54.

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sea, and the carrier is prima facie protected from liability for the loss of the goods during the transit by land as soon as he shows that no declaration was made by the sender: *Hart* v. *Baxendale* (1); *Great Northern Ry. Co.* v. *Rimell.* (2) In the present case the defendants when they first dealt with the furs had the protection conferred by the statute upon a carrier by land, and the onus is upon the plaintiffs to show that they have lost that protection.

MacKinnon, K.C., and *S. A. Kyffin*, for the plaintiffs. The defendants entered into a contract with the plaintiffs to deliver the goods at Belfast and they failed to do so. In order that the defendants may escape liability for their breach of duty they must show that they were carrying the goods by land when they were lost: *Pianciani* v. *London and South-Western Ry. Co.* (3) In that case and in *Baxendale* v. *Great Eastern Ry. Co.* (4), if the defendant companies' pleas had not respectively contained an allegation that the goods were in the defendants' possession as common carriers by land they would have been demurrable. The defendants in the present case are in the same position as if their liability were excluded by an exception in a bill of lading or by s. 502 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). Under that section it was held in *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (5) that the onus was on the shipowners to prove that the loss of the goods occurred without their fault or privity. In *Taylor* v. *Liverpool and Great Western Steam Co.* (6) certain goods were shipped at Liverpool on the defendants' ship for carriage to New York under a bill of lading by which loss by "thieves" was excepted. The goods were stolen before the time for delivery, but there was no evidence to show whether they were stolen by a member of the crew or by a passenger or, after the ship's arrival, by some person from the shore. It was held that "thieves" must be interpreted as only applying to thieves external to the ship, and that the onus lay on the shipowners to bring the loss within the exception by showing by whom the theft had been committed, and that as they had failed to do so the plaintiffs were entitled to recover for the loss. The principle of that case covers the present one. Parliament granted

(1) (1851) 6 Ex. 769.
(2) (1856) 18 C. B. 575.
(3) (1856) 18 C. B. 226.
(4) (1869) L. R. 4 Q. B. 244.
(5) [1915] A. C. 705.
(6) (1874) L. R. 9 Q. B. 546.

to carriers exemption from liability in certain cases, and it is for the carriers to show that they come within that exemption. In the present case the defendants can only do so by showing that the loss took place on land. The decision in *Le Conteur* v. *London and South-Western Ry. Co.* (1) was that where there is one entire contract to carry partly by land and partly by sea the contract is divisible, and that the carrier is within the protection of the Carriers Act so far as the land carriage is concerned.

Schiller, K.C., in reply. In *Taylor* v. *Liverpool and Great Western Steam Co.* (2) it was stated in the case that the box was stolen while on board the vessel, and the question was whether the loss came within the exceptions in the bill of lading, but a person who relies upon an exception in a bill of lading must show that he comes within it. That is very different from a case where the Carriers Act is relied upon as a defence. It is clear that a contract of carriage partly by land and partly by sea is divisible; the defendants rely upon the Carriers Act in regard to the portion of the carriage by land and deny that the loss occurred during the transit by sea, and the plaintiffs therefore must prove that the loss occurred by sea to entitle them to recover. The plaintiffs are not entitled to recover merely by virtue of a plea that the goods are lost.

A. T. LAWRENCE J. This case raises a question under the Carriers Act which is of importance. The action was brought by the plaintiffs in respect of the loss of three parcels of furs which they handed to the defendant company to be carried from London to Belfast. The plaintiffs did not declare the nature and value of the goods, as required by s. 1 of the Carriers Act, 1830, and consequently are not entitled to recover if their goods were lost during the carriage by land. The only evidence as to the loss of the goods is that the parcels were taken to Euston Station, beyond which place they cannot be traced, and the defendants are unable to give any evidence as to where the goods were lost. Mr. Schiller contends that in those circumstances the Carriers Act affords a complete protection to the defendant company. He says that the plaintiffs can only recover if they prove affirmatively that the goods were lost during the sea portion of the transit; that the onus of proof lies upon the

(1) L. R. 1 Q. B. 54. (2) L. R. 9 Q. B. 546.

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plaintiffs to show that the goods were lost at sea. In my opinion that contention is wrong. I do not think that any question as to the onus of proof arises in this case. The plaintiffs' cause of action is for breach of contract by the non-delivery of the goods that the defendants contracted to deliver, and in order to escape liability the defendants must plead a good plea—one that will cover the whole cause of action. This was a contract for the carriage of goods partly by land and partly by sea, and the defendant company set up a plea which would be an answer to the plaintiffs' claim only in respect of a loss during the carriage by land; but the defendants did not prove that the goods were lost during that portion of the transit, and consequently their plea is bad: it is just the same as if they had said that they carried the goods half-way to their destination. Suppose that the defendants had pleaded and proved that they had in fact carried the goods as far as Holyhead, which is the end of the land portion of the transit. That plea would have been no answer to the plaintiffs' claim for non-performance of the contract. As the contract of the defendants was to deliver the goods at Belfast, such a plea would have been demurrable. The Carriers Act, 1830, merely professes to give protection to a common carrier by land; it does not clothe the railway company with any special privileges in respect of all their obligations under the contract merely because they are carriers by land. The statute leaves them in the same position as other persons in respect of the carriage of the goods by sea. In order to obtain the protection afforded by the statute and so escape liability the defendants must show that these goods were lost in the course of their transit by land. That they have not done and have not attempted to do. In the case of *Pianciani* v. *London and South-Western Ry. Co.* (1) the railway company pleaded the statute, and the plea ended by saying: "The same being lost by the defendants out of their possession while the same were upon the said railway of the defendants, and in their possession and under their care as such carriers by land as aforesaid." There the plea set up a complete defence, but here it does not. The plea which the defendants set up does not say that the defendants lost the goods while they were carriers on land, and such a plea, if set up, could not have been proved. It

(1) 18 C. B. 226, 229.

seems to me, therefore, that this statute does not afford, and was not intended to afford, any protection to the defendants in respect of the obligation which they undertook otherwise than as carriers by land. In my opinion the plea of the Carriers Act is no answer to the plaintiffs' claim for breach of contract for the carriage of the goods both by land and by sea; it is a bad plea. The allegation by the plaintiffs that the defendants did not deliver the goods set up a complete breach of contract, and it was not necessary for the plaintiffs to prove anything further. I think the county court judge was right and that this appeal fails.

SHEARMAN J. I am of the same opinion. The case turns upon the true construction of s. 1 of the Carriers Act, 1830. The plaintiffs entered into a contract with the defendants for the carriage for reward of furs from London to Belfast. There is no question on the facts of this case that the defendants undertook to carry the furs as common carriers. The furs were lost, and when the plaintiffs sued the defendants for their failure to deliver, the defendants set up as a defence s. 1 of the Carriers Act. According to Mr. Schiller's argument on behalf of the defendants, inasmuch as these goods come within the class of goods to which s. 1 of the Carriers Act, 1830, applies, and as the plaintiffs failed to make the declaration required by that section, the contract of carriage must be treated as at an end and the plaintiffs as having no further rights under it. I think that argument is quite untenable. The defendants carried the goods as common carriers, and they are seeking to avail themselves of the protection afforded by s. 1 of the Carriers Act. I think it is clear from the terms of that section that it affords a protection to carriers who can show that the loss comes within the provisions of the Act. It is like an exception to a bill of lading. The preamble to the Act begins in this way: "Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage coach proprietors, and common carriers for hire is greatly increased." Sect. 1 provides that "from and

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after the passing of this Act no . . . . common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following"; and then it gives a list of valuable and other things, including furs, for the loss of which the carriers are not liable unless, when the goods are delivered to them for carriage, a declaration is made of their nature and value. The meaning of the section clearly is that a carrier by land can protect himself against the liability of a common carrier for the loss of the goods by showing that the goods were delivered to him without the declaration required by the Act and that they were lost during the carriage by land. That is the plea which the defendants set up in the present case, but as they failed to prove that the goods were lost during the carriage by land the plea is a bad one. The decision of the county court judge is therefore right and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Ballantyne, Clifford & Hett.*
Solicitor for defendants: *M. C. Tait.*

R. F. S.

[IN THE COURT OF APPEAL.]

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Jan. 25, 28, 29; *Feb.* 9.

WESTACOTT, Claimant *v.* HAHN, Respondent.

Landlord and Tenant—Covenant by Tenant to repair—"Being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors)"—Construction—Covenant by Landlord or Qualification of Covenant by Tenant—Custom—Inconsistency.

By an indenture of lease made in 1905 a farm in Middlesex was demised for a term of twenty-one years. The lease contained, among the covenants by the lessee, the following covenant: "And also will from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and substantially repair and maintain . . . . the farm house, stable, land and premises . . . . with all manner of needful and necessary reparations . . . . (damage by accidental fire excepted)." Towards the end of the deed there were certain covenants by the lessor. The deed contained a power to the lessor at any time to resume possession of and determine the tenancy as to any portion of the demised premises in the event of his selling or letting the same for any purpose (with certain exceptions) on giving three months' notice, allowing a proportionate abatement of rent, provided that if more than twenty-six acres were taken the lessee might on giving notice determine the lease. The deed also gave the lessor power to determine the lease at the end of the first seven or fourteen years with a view to selling or letting the land for any purpose (with certain exceptions); and it gave the lessee an unfettered power to determine the lease at the same periods; in each case on giving twelve months' notice:—

Held, by Pickford and Scrutton L.JJ., that the clause above set out within brackets, when read in conjunction with the rest of the deed, was a qualification of the lessee's covenant to repair, and not a covenant by the lessor to supply the materials necessary for the repairs.

By Bankes L.J.: The words in the main brackets relating to the allowance of materials were inserted as a qualification of the lessee's covenant to repair; and assuming that they were also words of covenant by the lessor, which in his opinion was the correct view, the words in the sub-brackets qualified that covenant by the lessor and gave him a right of veto.

Whether the clause is intended to be a covenant by the lessor or a qualification of the lessee's covenant depends in each case upon the

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provisions of the lease as a whole. A clause may be both a covenant and a qualification.

Held, further, that evidence of a custom—that "the landlord provides the tenant with materials necessary for the proper repair and maintenance of the demised premises, lands, and hereditaments, and the tenant repairs and maintains the same with such materials and provides the necessary cartage"—was inadmissible inasmuch as it would be inconsistent with the terms of the lease, which dealt with this subject in a particular manner.

Decision of the Divisional Court in *Westacott* v. *Hahn* [1917] 1 K. B. 605 approved.

APPEAL from an order of a Divisional Court refusing to set aside an award.

By an indenture of lease made on October 23, 1905, the predecessors of the respondent (therein called the lessors) demised a farm with the house and buildings in the parish of Hendon, Middlesex, consisting of about 131 acres, to the claimant, Westacott (called the lessee), for the term of twenty-one years from September 29, 1905, at the yearly rent of 272*l.* payable by equal quarterly payments on the usual quarter days. The lease contained (among the covenants by the lessee) the following covenant: "And also will from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and substantially repair and maintain, paint, tar, glaze, fence, hedge, ditch, scour, empty, cleanse, amend, and keep the farm house, stable, land, and premises and all other buildings which hereafter shall be erected and built upon the said demised land or any part thereof, and all the gates, posts, rails, stiles, fences, mounds, hedges, ditches, bridges, watercourses, main service pipes, branch pipes, stop-cocks, guard-boxes, stand-pipes, and bib-cocks to the said premises belonging or appertaining in, by, and with all manner of needful and necessary reparations, fencing, hedging, ditching, scouring, cleansing and amending whatsoever (damage by accidental fire excepted). And also will in the sixth, thirteenth, and twentieth year of the said term cause all the outside wood and ironwork of and belonging to the said farm house, stable and other buildings to be hereafter erected, to be painted with two coats of proper oil colours where previously painted, and all wood

and ironwork previously tarred, to be covered with good and sufficient coats of tar or pitch in a workmanlike manner, and the same premises being so well repaired and maintained as aforesaid at the end or other sooner determination of the said term which shall first happen will quietly and peaceably surrender and yield up unto the lessors together with all fixtures and improvements now or hereafter to be made thereon (damage by accidental fire excepted). And also that the lessee will do his best to maintain the present wood farm buildings or erections on the premises. And also that it shall be lawful for the lessors or their agents at all reasonable times during the said term to enter the said premises to examine the condition thereof. And further that all wants of reparation which upon such views shall be found and for the amendment of which notice in writing shall be left at the said premises the lessee will within three calendar months next after every such notice well and sufficiently repair and make good accordingly." There were also the following powers of determining the tenancy: "Provided also and it is hereby agreed between the said parties hereto that it shall be lawful for the lessors at any time or times to resume possession of or determine the tenancy of the lessee as to any portion or portions of the said demised premises in the event of their selling the same for any purposes or in the event of their letting the same for any purpose (other than agricultural or horticultural purposes or for dairying or for a golf club) on giving to the lessee three calendar months' notice of their intention in that behalf such notice to expire on a date between" August 1 and February 28, the lessors allowing the lessee a proportionate abatement of rent; provided that if the lessors shall under the foregoing provision give notice to resume possession of more than twenty-six acres of the land and the lessee shall within three months after the receipt of such notice give notice in writing to the lessors of his desire to determine the lease at the expiration of six months from the date of the lessors' notice, then immediately after the expiration of such period of six months the lease shall cease and be void. The lease also contained the following provision: "Provided always and it is hereby agreed that if the lessors shall be desirous of determining this present lease at the expiration of the first seven or fourteen years of the term hereby granted with a view to selling the same for any purpose other than

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agricultural or as a dairy farm or with a view to letting the same for any purpose other than agricultural or horticultural or than for a dairy farm or golf club, and of such their desire shall give twelve calendar months' previous notice in writing to the lessee . . . . or if the lessee shall be desirous of determining this present lease at the expiration of the first seven or fourteen years of the term hereby granted and of such his desire shall give twelve calendar months' previous notice in writing to the lessors . . . . then and in either of such cases immediately after the expiration of the said term of seven years or fourteen years as the case may be this present demise and everything herein contained shall cease and be void . . . ." The lease also contained towards the end thereof certain covenants by the lessors, and there was a clause referring any dispute concerning any matter or thing therein contained or the operation or construction thereof to two arbitrators, one to be appointed by each party in accordance with and subject to the provisions of the Arbitration Act, 1889.

The respondent (hereinafter called the lessor) was the assignee of the reversion attendant upon the lease. A dispute having arisen under the lease, the matter was referred to two arbitrators, who appointed an umpire. The arbitrators differed, and in the course of the arbitration the umpire stated a special case for the opinion of the Court under s. 19 of the Arbitration Act, 1889. The case in paragraph 4 set out the first part of the above-mentioned covenant by the lessee to repair down to "(damage by accidental fire excepted)" where it first occurs, and made the lease part of the case. The rest of the case was as follows :—

"5. The lessor has not called upon or required the lessee to repair the demised premises in accordance with the covenant hereinbefore referred to, but it is to be taken for the purpose of this case that the said premises are not in the state of repair required by the said covenant. In this arbitration between the lessor and lessee the lessee is claiming against the lessor damages in respect of the non-compliance by the lessor with the applications by the lessee in paragraph 8 hereof referred to.

"6. It was contended on behalf of the lessee : (1.) That upon the true construction of the covenant in paragraph 4 hereof referred to the lessor was under covenant and bound to allow, supply, or pay

the cost of at a distance not exceeding five miles from the said farm all materials necessary for the purpose of enabling the lessee to carry out the obligation to repair imposed upon him by the said covenant. (2.) Alternatively that if the lessor was not so bound the lessee was entitled to give evidence of a custom of the country whereby the lessor would be bound to allow materials necessary for the repair of the said premises.

"7. For the purposes of the consideration and decision of this case it is to be assumed that the custom alleged by the lessee is as follows:—'The landlord provides the tenant with materials necessary for the proper repair and maintenance of the demised premises, lands, and hereditaments, and the tenant repairs and maintains the same with such materials and provides the necessary cartage.

"8. It is also to be assumed for the purposes aforesaid that, if the lessor is bound to supply such materials as aforesaid, all necessary applications to him have been made by the lessee and have not been complied with.

"9. On behalf of the lessor it was contended: (1.) That upon the true construction of the said indenture the covenant in paragraph 4 hereof referred to was a covenant by the lessee only and not by the lessor, that the lessor was not under any obligation to allow, supply, or pay the cost of such materials unless he had first called upon or required the lessee to repair the demised premises in accordance with such covenant, and that the allowance of materials was a mere qualification of the lessee's liability thereunder to repair. (2.) That assuming any such custom to exist, the same was excluded and its operation prevented by the contract between the parties contained in the said indenture.

"The questions for the Court are:—

"1. Whether upon the true construction of the said indenture, and assuming all necessary applications to have been made to him, the lessor is under covenant to allow, supply, or pay the cost to the lessee of all necessary materials for the purpose of enabling the lessee to carry out the obligation to repair imposed upon him by the covenant in paragraph 4 hereof referred to although the lessor has not called upon or required the lessee to carry out such obligation; and

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"2. If the lessor is not so bound, whether by the contract between the parties contained in the said indenture the said alleged custom is excluded and its operation prevented."

The Divisional Court held (Viscount Reading C.J. and Ridley J., Lord Coleridge J. dissenting) that there was no covenant by the lessor to supply materials necessary for the proper repair and maintenance of the demised premises, but only a qualification of or condition precedent to the lessee's liability to repair. They all held that evidence of the alleged custom was not admissible as it would be inconsistent with the terms of the lease which dealt with this subject in a particular manner. The Court accordingly answered the first question that there was no such covenant by the lessor, and the second question that evidence of the custom was excluded, and that it was not open to the lessee to give evidence of the said custom. The case is reported [1917] 1 K. B. 605.

There being no appeal from that decision, the umpire subsequently made his award, to which he attached the special case and the answers of the Court thereto and made them part thereof, stating that, feeling bound by the answers of the Court, he heard no evidence as to the amount of the lessee's (the claimant's) alleged damage or otherwise (the facts stated in the special case being agreed), and awarded and determined that the lessee was not entitled in law to recover any sum from the lessor (the respondent) in respect of his claim and that the lessor was under no liability to the lessee in respect thereof.

The lessee moved the Court to set aside the award on the ground that there was error in law apparent on the face of the award. The Divisional Court (Bray and Avory JJ.) dismissed the motion, feeling bound by the previous decision of the Court. The lessee appealed. See *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (1)

A. Powell, K.C., and *Stuart Bevan*, for the lessee. The words in brackets are a covenant by the lessor that he will provide the necessary materials for the tenant to execute the repairs. No precise or technical language is required to make a covenant; the intention is to be looked at: *Hill* v. *Carr* (2); Platt on Covenants, pp. 27, 28;

(1) [1912] 3 K. B. 128; [1912] A. C. 673. (2) (1676) 1 Ch. Cas. 294.

Com. Dig., Covenant, A. 2; Bac. Abr., Covenant, vol. 2, p. 337; *Bush* v. *Coles* (1); *Cannock* v. *Jones* (2); Sheppard's Touchstone, p. 162; *Brookes* v. *Drysdale.* (3) The passage in Sheppard's Touchstone, p. 162, "And therefore if these words be inserted in a deed amongst other covenants, that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessee shall skowre ditches, provided always that the lessor do carry away the earth; these are good covenants on both sides," was cited with approval by Hall V.-C. in *Sear* v. *House Property and Investment Society.* (4) In *Mackay* v. *Dick* (5) Lord Blackburn said that "where both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect": see also *Churchward* v. *Reg.* (6) The statement in Rolle's Abridgment, vol. 1, Covenant, C. 3, p. 518, contrary to that in Sheppard's Touchstone, is founded on *Holder* v. *Tayloe* (or *Taylor*) (7), but that case as reported does not bear out the statement in Rolle. D'Anvers's Abridgment is only a translation of Rolle's Abridgment with marginal notes, and therefore the same statement as in Rolle appears in vol. 2, Covenant, C. 3, p. 229. In Viner's Abridgment, vol. 6, Covenant, C. 3, p. 378, the same proposition is again taken from Rolle's Abridgment. Therefore the word "agree" or some such word is not necessary to constitute a covenant. A covenant may be a qualification of another covenant, but it does not thereby cease to be a covenant. A covenant by a lessee to repair a house, 5000 slates being found, allowed, and delivered by the lessor towards the repair, is a covenant by the lessor: *Mucklestone* v. *Thomas* (8); see also *Warren* v. *Asters.* (9) In *Thomas* v. *Cadwallader* (10), which is relied upon in the judgment of the Divisional Court, the Court seems to have thought that there was a covenant by the lessor, though it was also a qualification of the lessee's covenant. A covenant

(1) (1692) Carth. 232.
(2) (1849) 3 Ex. 233.
(3) (1877) 3 C. P. D. 52.
(4) (1880) 16 Ch. D. 387.
(5) (1881) 6 App. Cas. 251, 263.
(6) (1865) L. R. 1 Q. B. 173, 195.
(7) (1613) Hob. 12; 1 Brownl. 23.
(8) (1739) Willes, 146, 149.
(9) (1682) T. Jones, 205.
(10) (1744) Willes, 496.

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by a lessee to plough and sow the land except the rabbit warren is a covenant by him not to plough the rabbit warren: *Duke of St. Albans* v. *Ellis*. (1) In *Treloar* v. *Bigge* (2) the lessee covenanted not to assign without the written consent of the lessor, such consent not being arbitrarily withheld, and it was held not to be a covenant by the lessor not to refuse his consent arbitrarily. Amphlett B., in saying (3) that the words cannot be both a qualification of the tenant's covenant and a covenant by the landlord, was speaking of the words in that particular lease. There is a covenant here by the lessor to provide the necessary materials, which he is to approve, and he is liable in damages for not having provided the materials. [*Lord Cromwel's Case* (4), *Pordage* v. *Cole* (5), *Jones* v. *Barkley* (6), *Duke of St. Albans* v. *Shore* (7), *Glazebrook* v. *Woodrow* (8), and Foa on Landlord and Tenant, 5th ed., p. 281 (as to meliorating waste), were also referred to.]

If there is no covenant by the lessor to supply materials, evidence of the custom set out in paragraph 7 of the special case is admissible. It is a custom of the county of Middlesex. If incorporated in the lease it would supplement, and not contradict, it: *Humfrey* v. *Dale* (9); *Tucker* v. *Linger*. (10) [*Webb* v. *Plummer* (11) and *Roberts* v. *Barker* (12) were also referred to.]

J. B. Matthews, *K.C.*, and *Vernon*, for the lessor. This is not a case of independent covenants by the lessor and lessee respectively. The words in question are merely a qualification of or condition precedent to the obligation of the lessee under his covenant to repair. The decision in *Thomas* v. *Cadwallader* (13) is in point. *Mucklestone* v. *Thomas* (14) turned on a point of pleading. In *Cannock* v. *Jones* (15) the decision turned upon the words " and kept in repair " as showing a covenant by the lessor. In *Warren* v. *Asters* (16) the words clearly amounted to a covenant by the lessor, because his act was to be done subsequently to the act of felling the trees. This distinction is pointed

(1) (1812) 16 East, 352.
(2) (1874) L. R. 9 Ex. 151.
(3) Ibid. 156.
(4) (1601) 2 Rep. 69a.
(5) (1669) 1 Saund. 319l.
(6) (1781) 2 Doug. 684.
(7) (1789) 1 H. Bl. 270.
(8) (1799) 8 T. R. 366.
(9) (1857) 7 E. & B. 266.
(10) (1883) 8 App. Cas. 508.
(11) (1819) 2 B. & A. 746.
(12) (1833) 1 Cr. & M. 808.
(13) Willes, 496.
(14) Willes, 146, 149.
(15) 3 Ex. 233.
(16) T. Jones, 205.

out in *Thomas* v. *Cadwallader*. (1) *Treloar* v. *Bigge* (2) is in the respondent's favour, and that case was followed in *Sear* v. *House Property and Investment Society*. (3) The question really depends upon the construction of each deed as a whole so as to ascertain what was the intention of the parties. Looking at the lease as a whole, especially the clauses giving the lessor power to determine the tenancy as to any part of the land, in which case the lessor would wish to reserve to himself the power of refusing to provide materials for repairs where he might be going to sell the land or part thereof for building purposes, the clause in question is only a qualification of the lessee's covenant to repair, and not a covenant by the lessor. The words are not apt to create a covenant, and if they had been intended as a covenant they would have been inserted in proper form among the lessor's covenants. In Bythewood and Jarman's Precedents in Conveyancing, 4th ed., vol. 3, p. 380, a proper form of covenant by the landlord to provide materials for repairs is given. The passage in Sheppard's Touchstone, p. 162, "provided always that the lessor shall allow timber," is clearly a covenant by the lessor, and not a mere qualification of the lessee's covenant. *Holder* v. *Tayloe* (4), on which the passage in Rolle's Abridgment, Covenant, C. 3, is founded, is only reported on one point, but the judges may have decided other points, and that passage is referred to in *Thomas* v. *Cadwallader* (1) with approval. It is not now contended that the absence of the word "agreed" is conclusive to show that there is no covenant. "Any words in a deed which show an agreement to do a thing make a covenant; but it must be clear that they are meant to operate as an agreement, and not merely as words of condition or qualification": *Wolveridge* v. *Steward* (5), citing Com. Dig., Covenant, A. 2, 3. [*Dean of Bristol* v. *Jones* (6) was also referred to.]

With regard to the evidence of the alleged custom, the lease deals with the matter in a particular way, and the custom is inconsistent with that. [*Hutton* v. *Warren* (7) and Foa on Landlord and Tenant, 5th ed., p. 703, were referred to.]

A. Powell, K.C., in reply.

Cur. adv. vult.

(1) Willes, 499.
(2) L. R. 9 Ex. 151.
(3) 16 Ch. D. 387.
(4) Hob. 12; 1 Brownl. 23.
(5) (1833) 1 Cr. & M. 644, 657.
(6) (1859) 1 E. & E. 484.
(7) (1836) 1 M. & W. 466.

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Feb. 9. PICKFORD L.J. read the following judgment:—In this case the tenant under a lease seeks to set aside an award on the ground of error on the face of it.

During the arbitration the umpire stated a case for the opinion of the Court under its consultative jurisdiction. The questions in that case were decided against the tenant by the majority of the Divisional Court (1) (the Lord Chief Justice and Ridley J., Lord Coleridge J. dissenting), and the umpire embodied that case and opinion in his award. The tenant moved to set it aside, but the Divisional Court naturally felt bound by the previous decision and refused the motion. The tenant then appealed to this Court really against the first decision, basing his right to appeal on the case of *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (2)

The question involved is as to the meaning of a clause in a lease of land at Hendon, near London. It is a lease for twenty-one years determinable as mentioned below, and contains these covenants. [The Lord Justice read the covenants by the lessee to repair set out above.] It also contains a power to the lessors to determine the lease at the end of the first seven or fourteen years by twelve months' notice with a view of selling the farm for certain purposes, and an unfettered power to the tenant to determine at the same periods and on the same notice. The lessors also have power to resume possession or determine the tenancy of any part of the demised premises on three months' notice for certain purposes, giving an abatement of rent, provided that if more than twenty-six acres be taken the tenant can by giving notice determine the lease.

The controversy in this case is as to the meaning of the words following: "(Being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and carting such materials free of cost a distance not exceeding five miles from the farm)"; i.e., whether they are a covenant by the landlord to provide the materials, or are merely a qualification of the tenant's covenants to repair and leave in good repair. This, in my opinion, depends entirely upon how they are to be construed in this lease having regard to all its provisions.

A great number of authorities beginning in early days were cited

(1) [1917] 1 K. B. 605. (2) [1912] 3 K. B. 128; [1912] A. C. 673.

to us, but I do not think they are of much assistance. No doubt in the construction of wills and in conveyancing words which have acquired a certain meaning by a long course of decisions and practice must be taken to be used in that meaning, although it might not be the obvious one to persons unacquainted with those decisions and that practice. But it clearly would be most difficult to apply that principle to a clause in a document which must depend for its meaning upon its context, and even to a considerable extent upon the collocation of the words used. This is exemplified by the fact that words similar to these have been given directly opposite meanings by such authorities as Sheppard's Touchstone, p. 162, and Rolle's Abridgment, Covenant, C. 3, vol. 1, p. 518. Both of these statements have been approved by the Courts in subsequent cases, and in each the meaning of the words is stated apart from their context.

I think the only principle which these cases establish which is useful to the question before us is that covenant is a matter of intention, and that any words will make a covenant, whether participial or not, if it can be clearly seen that such was the intention of the parties. A participial clause, therefore, such as that in this case, may be only a qualification of the previous covenants of the lessee, or it may be a covenant by the lessor to perform what is mentioned in the clause. If it be such a covenant, it may be also a qualification in the sense that the lessor's performance of his covenant may be a condition precedent to the lessee's obligation to perform his. In former days it seems to have been considered that a clause could not be both a covenant and a qualification, but I think that is not the law now. The dictum of Amphlett B. in *Treloar* v. *Bigge* (1), which was cited as expressing a contrary opinion, is, I think, intended only to apply to the particular clause under consideration in that case.

I proceed, therefore, to consider the clause having regard to the provisions of the lease in which it occurs. In the first place I think it appears that the clause is rather clumsily drafted. It is introduced by a double parenthesis into a well-known form of tenant's repairing covenant, apparently without much consideration of its effect upon the other repairing covenants which follow. In the sub-parenthesis

(1) L. R. 9 Ex. 156.

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it contains these words: "To be previously approved in writing by the lessors," which do not seem to have been considered of importance by the Divisional Court. I think they are important because they give to the lessor a power of approval or disapproval, which points rather against than towards an absolute obligation. The approval may refer to purpose or materials. If it refers to the former, it seems to me quite inconsistent with an absolute obligation to provide materials for necessary repairs whenever the tenant wishes to do them. I do not see how there can be an absolute obligation to provide materials for repairs which cannot be done unless the lessor who has to provide the materials approves of them. If, as I incline to think, approval refers to materials and not to purpose, the argument is not so strong, but again, such a power of approval or disapproval being reserved to the lessor seems to me to be rather contrary to the idea of an absolute obligation to provide materials. The subsequent clauses as to determination of the tenancy, especially that as to resuming possession of the demised premises for certain purposes on three months' notice subject to the lessee's rights to terminate the lease if more than a certain quantity be taken, point in the same direction. They are no doubt inserted because the land from its situation is likely soon to become available as building land, and the lessor might very likely consider some repairs unnecessary, or the materials proposed to be used unsuitable and of too substantial a character, if, as might happen, the lessee proposed to execute them on a part of the premises which the lessor intended to retake or to sell. I think all these terms point to some reservation to the lessor of a discretion as to execution of the repairs and explain the object of the words in the sub-parenthesis, and the result is that in my opinion the clause in question, when read in conjunction with the rest of the instrument in which it occurs, should be construed as a qualification only of the lessee's covenants, and not as a positive covenant by the lessor. I wish to say nothing as to what the clause might mean in another instrument and with another context.

The lessee also contended that he was entitled to give evidence of a custom whereby the lessor would be bound to allow materials necessary for the repair of the premises. The custom alleged is set out in paragraph 7 of the special case. [The Lord Justice read

it.] I think that this evidence was not admissible, and I agree with the decision of the Divisional Court on this point.

The appeal must be dismissed with costs.

BANKES L.J. read the following judgment:—This is an appeal from a decision of the Divisional Court upon the construction of a sentence introduced into a tenant's covenant to repair contained in a lease made between the respondent's predecessors in title and the appellant. Both in the Divisional Court and in this Court an elaborate examination of authorities bearing on the point was made by the appellant's counsel. I do not propose to discuss the authorities, or to express any opinion as to the view taken in the Divisional Court of some of them. In the view I take of the lease it would be of no use to do so; and indeed, if my view is right, it would appear as though what I consider the real point in the case had been lost sight of under the mass of authority which the Divisional Court was asked to consider. The lease which it is necessary to construe is a lease for a period of twenty-one years from September 29, 1905, of a farmhouse and buildings and 131 acres of land situate near Ashley Lane and Dale Street or Sanders Lane, in the parish of Hendon, in the county of Middlesex. I think that I find sufficient materials within the four corners of the lease itself to enable me to come to a definite conclusion as to the meaning which ought to be attributed to the words with regard to which the dispute has arisen. It is, I think, in the first place obvious that the general form of the lease has been taken from a precedent in which the lessee's and the lessor's covenants had been kept distinct, and dealt with separately, and that special clauses have been inserted here and there in the document to meet the special circumstances of the particular case. To some of such clauses I attach importance. They have reference to the power enabling either party to determine the lease. There is a very special power enabling the lessors to determine the lease at three months' notice, and there is the usual clause enabling either party to determine the lease at the end of the first seven or fourteen years. These clauses, so far as they deal with the lessors' rights in this respect, limit the right of determining the lease to a case where the lessors do so with a view of selling the farm for any purpose or of letting it for any purpose other than agricultural or horticultural

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or than for a dairy farm or golf club. If the lessors exercise this right under the latter clause, then twelve months' notice has to be given. The inference which I draw from the terms of these clauses, coupled with the situation of the farm, is that the parties had in contemplation and were making provision for the possibility of the lessors requiring possession for the purpose of selling or letting the land for building. The power of the tenant to determine the lease is not fettered by any conditions. He may do so at the end of the first seven or fourteen years on giving twelve months' notice. The provisions of these clauses must necessarily, I think, have been taken into consideration by both parties in settling the terms of the repairing covenant. So far as the tenant's obligations under that covenant are concerned it is obvious that it was so, as the part of the clause fixing the dates when the premises must be painted, &c., fixes the sixth and thirteenth years as those in which the work must be done—that is to say, in each case the year before the one in which the lease can be determined by the tenant. The observation is also, I think, true in regard to the landlord's obligations, a point which I shall deal with later. The repairing clause itself is obviously a piece of patchwork. It contains a double parenthesis; the provisions of the first and last part of the clause in relation to the wooden buildings are inconsistent; and the question as to whether the supply of materials applies to the painting and tarring, which are to be done at the fixed periods named in the second part of the clause, is left in uncertainty. The actual words of the clause with regard to which the dispute has arisen are as follows: "And also will from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and sufficiently repair." The dispute between the parties has been, and is, whether the landlord is under any obligation to allow the materials for necessary repairs upon being called upon by the tenant to do so. In the Court below the discussion seems to have turned entirely upon the question whether the words "being allowed all necessary materials," &c., were words of covenant by the lessors as to what they would do, or merely words qualifying the tenant's covenant

as to what he would do. Where I think the discussion was too limited in its scope is that it omitted any reference to what from my point of view are the governing words, namely, "to be previously approved in writing by the lessors." I do not think that it requires a mass of authority to establish the proposition that the words in a lease "being allowed all necessary materials," &c., may be words of covenant, or words of qualification, or words both of covenant and qualification. The construction to be placed upon the words in any particular case must be determined by a consideration of the lease as a whole, and of any particular language in the lease which is used in connection with the words under discussion. It is, I think, obvious from the construction of the clause that the words in the first parenthesis relating to the allowance of materials were inserted as a qualification upon the tenant's general obligation to repair, and that the words in the second parenthesis were inserted as a qualification upon that qualification. The introduction of this later qualification appears to me to throw some light upon the question whether the words which they are inserted to qualify were words of qualification only or words of covenant also. If they were words of qualification only, there seems no reason for inserting the second qualification unless it was because it was thought that, the word being "allowing" and not "providing" materials, the tenant could himself provide the materials without consulting the landlord and do the repairs, and afterwards claim to be allowed in account for the materials. The more probable reason, as it seems to me, is that the words were accepted by the lessors as words of covenant, which in their own interest they desired to qualify. It is by no means clear whether the qualification contained in the second parenthesis applies to the materials or to the purpose for which the materials are required. I think myself that the more natural construction is to apply the qualification to the purpose rather than to the materials, but I do not think that it makes any difference for the present purpose which construction is adopted. Assuming for the purposes of argument that the tenant's contention is correct, and that the words referring to the allowance of materials are words of covenant by the lessors, yet the lessors did by the words inserted in the second parenthesis insert in their own interest a qualifying condition precedent which in substance gave them a right of veto, whether the previous

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approval in writing applies to the materials for the necessary repairs or to the repairs themselves. It is no doubt unusual for a landlord to refuse permission for necessary repairs to be done even where he may have to provide the materials himself; but it is what has happened here, and the reason may be found (if reason is wanted) in the fact that the landlord may be intending to take advantage of the clauses in the lease enabling him to determine the lease as to the whole or portion of the land demised. However that may be, the landlord has refused his consent, and, as the lessors reserved their right to do so, the question which has been so much debated in the present case does not, in my opinion, really arise.

A second point was taken for the appellant in reference to the question whether, having regard to the terms of the lease, evidence of a custom with regard to the finding of materials is admissible. In the view, which I have indicated, that the so-called words of qualification are words of covenant also, the custom is obviously inadmissible. But upon the other construction it is, in my opinion, equally inadmissible. Where the parties have in the lease itself dealt with the very question of the supply of materials by the landlord by way of qualification only, it is not, in my opinion, admissible to add to that provision the provision obtained from the custom that the landlord is under obligation to provide them. For these reasons I think that the appeal fails.

SCRUTTON L.J. read the following judgment:—A lease between a landlord and tenant of agricultural land at Hendon, which being near London was likely soon to be converted into building land, contains a clause by which the tenant covenanted that he would "from time to time during the said term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require . . . . repair," &c. There were also covenants by the tenant to deliver up the premises "so well repaired" at the end of the tenancy, and to repair all wants of reparation within three months from notice from the landlord so to repair.

The tenant desired repairs; the landlord refused to provide or

pay for materials. The tenant thereupon claimed arbitration (1.) on his claim based on an alleged covenant by the landlord to provide the necessary materials for needed repairs; (2.) on an alleged custom of the county to the same effect. During the arbitration the umpire stated a special case for the consultative opinion of the Court. This case contained the statements: "It is to be taken for the purpose of this case that the said premises are not in the state of repair required by the said covenant" (i.e., of the tenant). "It is also to be assumed . . . . that if the lessor is bound to supply such materials" (apparently those mentioned in the covenant) "as aforesaid, all necessary applications to him have been made by the lessee and have not been complied with." The custom alleged by the lessee was also set out. The questions for the Court are: [The Lord Justice read them.] Nothing is expressly said in the case about the effect of the clause "to be previously approved in writing by the lessors."

This case came before the Divisional Court, composed of the Lord Chief Justice, Ridley J. and Lord Coleridge J. The Court was divided in opinion, but the two first-named judges were of opinion that there was no such covenant by the lessor; and all were of opinion that evidence of the custom was excluded by the terms of the lease. This judgment being consultative was not directly appealable, and the umpire then made his award in accordance with it, annexing it to his award. Under the recent decision of the House of Lords in the *British Westinghouse Case* (1) it is possible to question such an unappealable decision, if embodied in an award, by alleging that error in law appears on the face of the award. This was accordingly done; the Divisional Court felt themselves bound by their previous decision, and refused the motion. An appeal is now made to this Court from that refusal, but in effect questioning the previous decision of the Divisional Court.

A flood of authorities in and since the seventeenth century were poured out upon the Court, in which somewhat similar words to this covenant had received a construction from the Courts. In my view, however, the first thing to be done is to endeavour to ascertain from the words the parties have used in this case their actual intention. If they have used words which by a settled course of

(1) [1912] A. C. 673.

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authority have acquired a technical meaning, the Court will give effect to those authorities; but, unless this is so, it appears to me very unprofitable to consider what Courts have thought that other words in other documents meant and to see which reported case has the least differences from the present.

There is, I think, no dispute as to the nature of the question to be decided in this case and some principles applicable to it. The question is whether the words beginning "being allowed" in the lessee's covenant contain a covenant by the lessor to provide or pay for materials for repairs, or whether they are only a qualification or limitation of the lessee's covenant, their effect being that the lessee covenants to repair if, and only if, the lessor provides the materials, but there is no obligation on the lessor to provide such materials, only the inducement that if he does not he may not get the repairs done. The question is not, there being two covenants, whether they are dependent, so that the performance of one is essential to an action for a breach of the other, or independent, so that either can be sued on, whether the other has or has not been performed. The learning of *Pordage* v. *Cole* (1) is, I think, out of place here. The question is whether there are really two covenants, one by the lessee, one by the lessor, or only one, by the lessee, limited in the sense that he need not perform it unless the lessor has assented to provide the materials. I think the question is confused by a wide interpretation of such phrases as that of Amphlett B. in *Treloar* v. *Bigge* (2)—the words "either qualify the tenant's covenant, or they create a covenant on the landlord's part. They cannot do both"—if they are translated, as in the Lord Chief Justice's judgment, into "whether the language used amounts to an independent covenant, or only to a condition precedent to the obligation of the other party." (3) The two questions are not the same. Words may be both a covenant by one party and the condition precedent of the obligation of the other party. Whatever may have been the state of the law when Willes C.J. in *Thomas* v. *Cadwallader* (4) expressed his dislike of the cases which had decided that the breach of one relative covenant cannot be pleaded in bar to an action brought for the breach of the other, it is impossible since

(1) 1 Saund. 319l.
(2) L. R. 9 Ex. 156.
(3) [1917] 1 K. B. 611.
(4) Willes, 499.

Behn v. *Burness* (1) to dispute that one term of a contract may be in its performance essential, or a condition precedent, to obligation or liability on another term of the contract, though if it is waived the only remedy may be an action for the breach. In this sense a condition precedent is a limitation or qualification of another term of a contract, while it may also be itself a term of a contract whose breach gives a cause of action. The question in this case is not whether failure to assent to supply materials is an answer to an action for not repairing, but whether there is a promise to supply materials, the breach of which gives rise to a cause of action.

Nor is there any doubt that no particular form of words is necessary to create a covenant. "I agree" is not necessary; a participial form of words will do. As Maule J. said in *Rashleigh* v. *South Eastern Ry. Co.* (2), "any words are sufficient for that purpose, which shew an intention to be bound by the deed to do or omit that which is the subject of the covenant: any such words are sufficient, and some such words are necessary, to make a covenant." Does, then, this deed contain words showing that the lessor intended to bind himself to provide materials for necessary repairs, or did he intend to leave himself at liberty to refuse to provide them, risking the consequence that the lessee might not do the repairs? The lease allows the lessor to terminate it at any time by three months' notice, obviously for building purposes; and one would expect the lessor not to be anxious to spend money on repairs of a building which he might be pulling down in three months' time in order to develop the estate. The clause provides that either the purposes of the repairs or the materials (I think the latter) are to be previously approved in writing by the lessors, which I can only read as a reservation of his liberty to disapprove. The lessee is to repair, "being allowed all necessary materials, to be previously approved," which though not an impossible seems to me a very odd way of binding the lessor to provide necessary materials for repairs. This is especially so as there are numerous decided cases in which a power of withholding approval if unjustifiably exercised has been held to involve no breach of contract by the lessor, though it might absolve the lessee from the consequences of acting without approval. There are also numerous cases in which somewhat similar words

(1) (1863) 3 B. & S. 751. (2) (1851) 10 C. B. 612, 632.

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have been held to create no covenant on the part of the lessor. Clear words might easily have been used and have not been. Under these circumstances I decline to find a covenant by the lessor in these ambiguous words, and I prefer to rest my judgment on the deed itself rather than on an exhaustive consideration of the numerous other deeds and cases to which we were referred. For these reasons I agree with the result arrived at by the majority of the Divisional Court, and I think sufficient meaning is given to the words by treating them as a limitation of the liability of the lessee on this and the other covenants to repair, so that he is not bound to execute repairs if the landlord does not previously assent to bear the cost of the materials necessary for them.

As to the second question, the admissibility of the alleged custom, I quite accept the principles stated by Lord Campbell in *Humfrey* v. *Dale* (1), and restated by the Court of Appeal in *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* (2), but I think a custom is excluded by a clause in the contract dealing with the same subject-matter in a way inconsistent with the custom. That is the case here, and I entirely agree with the Divisional Court on this point. In my judgment the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for lessee: *H. H. Wells & Sons.*
Solicitors for lessor: *Savery & Stevens.*

(1) 7 E. & B. 266. (2) [1917] 1 K. B. 320, 330, 331.

W. F. B.

[IN THE COURT OF APPEAL.]

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LONDON COUNTY AND WESTMINSTER BANK, LIMITED *v.* TOMPKINS.

[1917 L. 196.]

Mortgage—Default—Recovery of Mortgage Debt—"Equitable Mortgage"—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 *& 6 Geo.* 5, *c.* 97), *s.* 1, *sub-s.* 4; *s.* 2, *sub-s.* 4 (*b*).

By s. 1, sub-s. 4, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, it shall not be lawful for a mortgagee under a mortgage to which the Act applies (i.e., of small dwelling-houses), during the continuance of the Act and so long as certain conditions are fulfilled by the mortgagor, to take any steps for enforcing his security or for recovering the principal money thereby secured. By s. 2, sub-s. 4, the Act shall not apply "(*b*) to an equitable charge by deposit of title deeds or otherwise."

In 1912 the defendant, as security for a present or future overdraft, deposited with the plaintiff bank the title deeds of certain houses, which came within the description of "small dwelling-houses" in the Act, and he executed a deed in which he stated that he undertook to pay on demand the moneys that should for the time being be due from him to the bank, and he thereby charged his interest in the property comprised in the deeds with payment of the said moneys on demand; he declared that the bank should be deemed mortgagees under the deed of all the premises thereby charged; he undertook on request to execute a further legal or other mortgage of the premises; he gave the bank a power of sale on default in payment; he declared that during the continuance of the security he would hold the property charged in trust for the bank, with power to the bank to remove him from being trustee and to appoint themselves or any persons to be trustees and to make a declaration vesting all his said estate and interest in such new trustees; and he irrevocably appointed certain officials of the bank to be his attorneys for executing certain documents, including a conveyance of his estate and interest in the premises. In 1917 the plaintiffs sued to recover the amount then due on the overdraft. The defendant pleaded that the deed was a "mortgage" within the meaning of s. 1, sub-s. 4, of the above mentioned Act, and that the action was not maintainable:—

Held, that this was an "equitable charge" within s. 2, sub-s. 4 (*b*), of the Act, and that the action was maintainable.

By Pickford L.J.: "Mortgage" in s. 1, sub-s. 4, means a conveyance of property subject to redemption, and therefore this

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deed was not a mortgage; it was, however, an "equitable charge" within s. 2, sub-s. 4 (*b*).

By Bankes and Scrutton L.JJ.: "Mortgage" includes an equitable mortgage, and the deed was a "mortgage" within s. 1, sub-s. 4, but was taken out of that section by the exception in s. 2, sub-s. 4 (*b*).

Judgment of Shearman J. [1917] W. N. 228 affirmed.

APPEAL from the judgment of Shearman J. at the trial of the action without a jury. (1)

The plaintiffs sued to recover the sum of 1795*l.* due upon an overdraft and interest thereon.

The following deed (in a printed form) dated December 14, 1912, was executed by the defendant in favour of the plaintiffs: "I, Thomas Tompkins, of No. 140 High Street, Berkhamsted, in the county of Hertford, butcher, hereby declare that I have deposited with you the deeds and documents mentioned in the schedule hereto as security for the payment of all moneys for the time being due or owing or capable of becoming as between me and you due or owing from me to you on any account whatsoever including charges for interest and commission and other usual or lawful bankers' charges as well after the termination as during the continuance of the relationship of customer and banker, and all costs, charges, and expenses which you may pay or incur in stamping this or any other deed or document deposited with you or in perfecting the present security or in enforcing or obtaining payment of such moneys, or in paying any rent, rates, taxes, or other outgoings in respect of or in insuring, repairing, maintaining, managing or realizing any hereditaments or other property comprised in such deeds and documents. And I undertake that I will pay to you on demand in writing addressed and sent by post or otherwise . . . . such of the said moneys as for the time being shall be actually due to you. And by this deed I charge all my present and future estate and interest, both legal and equitable, in all the hereditaments and other property comprised in the said deposited deeds and documents and all money which may or but for these presents might become payable to me or my representatives or assigns by virtue of any sale, further mortgage, or charge which I or any person claiming under me may make

(1) [1917] W. N. 228.

of or on the same or any part thereof or interest therein with payment of the said moneys on demand, and I declare that you shall accordingly be deemed mortgagees under this deed of all the said premises hereby charged. And I undertake that I and all other necessary parties (if any) will on any request for this purpose . . . . make, execute and deliver to you or to such person or persons as you may appoint such further valid legal or other mortgage or mortgages by deed or otherwise of the premises hereby charged as you may require. And that every such mortgage shall be prepared by your solicitors at my expense, and shall contain such expressed and implied covenants powers and provisions as your said solicitors shall think proper, including a provision that the mortgagee's powers and rights shall be exercisable immediately after any such demand as aforesaid. And I declare that in the meantime you shall have and may exercise at any time after any such demand and without any further notice to or default by me or any person claiming under me such power of sale and other powers as by any statute " shall be exercisable by a mortgagee by deed when default has been made in payment of the mortgage money for more than three months or other the statutory period after service on the mortgagor of notice requiring payment thereof. " And I declare that during the continuance of the present security I will hold all my present and future estate and interest hereby charged in trust for you as such mortgagees thereof as aforesaid and will convey the same as you shall direct, and I authorize you during the continuance of the present security by deed to remove me or any other person from being a trustee in respect of the trust hereinbefore declared and to appoint yourselves or any persons or person to be trustees or a trustee in respect of the said trust and thereupon to make a declaration vesting all my said estate and interest in such new trustees or trustee. And I hereby irrevocably appoint " certain officers of the bank " and each of them or the persons for the time being holding the said respective offices and each of them and all and every persons and person appointed substitutes or substitute as hereinafter mentioned jointly and severally my attorneys and attorney for me and on my behalf and as my act and deed to make, execute, and deliver every or any such further mortgage or mortgages as aforesaid, or (without executing any such mortgage) to make, execute, and deliver any

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conveyance of all my present and future estate and interest in the said hereditaments and premises or any part thereof to any purchaser or purchasers thereof on a sale by you as mortgagees; and I authorize you to appoint any substitutes or substitute for both or either of my attorneys hereinbefore appointed . . . . and I undertake to abide by, ratify, and confirm every matter or thing which such original or substituted attorneys or attorney or any of them shall do or cause to be done under the present deed. . . . . "

The writ in the action, specially indorsed, was issued on February 12, 1917. The defendant pleaded that the said deed was a "mortgage" within the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (1), and that the plaintiffs were therefore debarred from maintaining this action. The premises comprised in the schedule to the deed were premises to which the Act applied.

(1) 5 & 6 Geo. 5, c. 97—"An Act to restrict, in connection with the present war, the increase of the rent of small dwelling-houses and the increase of the rate of interest on, and the calling in of, securities on such dwelling-houses"—by s. 1, sub-s. 4, provides that: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, during the continuance of this Act, and so long as interest at the standard rate is paid and is not more than twenty-one days in arrear, and the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed, and so long as the mortgagor keeps the property in a proper state of repair and pays all interest and instalments of principal recoverable under any prior incumbrance, to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured. . . . ."

Sect. 2, sub-s. 1, defines the expressions used in the Act, and sub-s. 2 states that the Act shall apply to houses where the standard rent or rateable value does not exceed a certain sum.

Sub-s. 4 provides that, "Subject to the provisions of this Act, this Act shall apply to every mortgage where the mortgaged property consists of or comprises one or more dwelling-houses to which this Act applies, or any interest therein except that it shall not apply—

"(*a*) to any mortgage comprising one or more dwelling-houses to which this Act applies and other land if the rateable value of such dwelling-houses is less than one-tenth of the rateable value of the whole of the land comprised in the mortgage, or

"(*b*) to an equitable charge by deposit of title deeds or otherwise."

Shearman J. held that "mortgage" in the Act meant a document by which property was assigned subject to redemption; that this deed was not a mortgage within the Act, but was an equitable charge within the exception in s. 2, sub-s. 4 (*b*); and that therefore the action was maintainable. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

Whateley, for the defendant. This deed is a "mortgage" within the meaning of s. 1, sub-s. 4, and s. 2, sub-s. 4, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. By the deed the plaintiffs are to be "deemed mortgagees," the defendant undertakes to execute a "further valid legal or other mortgage" of the premises, there is a power of sale, the defendant declares himself to be a trustee of the property charged for the plaintiffs and authorizes them to appoint themselves trustees in his place, and he irrevocably appoints certain persons as his attorneys to execute a conveyance of the property. The plaintiffs therefore could at any time appoint themselves trustees and thus vest the legal estate in themselves. The deed is "a conveyance of land": *Santley* v. *Wilde* (1); it is not enforceable only in equity: *Jones* v. *Woodward*. (2) An "equitable charge" is one which can be enforced only by the assistance of a Court of Equity. "An equitable charge is a security which does not transfer the property with a condition for reconveyance, but only gives a right to payment out of the property. It entitles the holder to have the property comprised therein sold to raise the money charged thereon, but it does not amount to an agreement to give a legal mortgage, and the strict mode of enforcing it is by sale and not by foreclosure": Halsbury's Laws of England, vol. 21, p. 83, par. 151, citing *Matthews* v. *Goodday*. (3) This deed conveys the equitable estate, and gives the mortgagees power to get in the legal estate and enforce the security without invoking the assistance of the Court: see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 12. There is an equitable assignment. "The language is immaterial if the meaning is plain": per Lord Macnaghten in *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (4) An

(1) [1899] 2 Ch. 474. 378.
(2) [1917] W. N. 61; 116 L. T. (3) (1861) 31 L. J. (Ch.) 282.
(4) [1905] A. C. 454, 462.

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instrument is a mortgage if property is conveyed at law or in equity. This deed is a mortgage, and not an " equitable charge " within the exception in s. 2, sub-s. 4 (*b*), of the Act. The action therefore is not maintainable. [*Campbell* v. *Holyland* (1), *Durham Brothers* v. *Robertson* (2), *In re Farnol Eades Irvine & Co.* (3), *Ness* v. *O'Neil* (4), and Fisher on Mortgages, 6th ed., s. 24, were also referred to.]

Hawke, K.C., and *W. T. Lawrance*, for the plaintiffs. This deed is not a " mortgage " within the meaning of the Act. The deed does not give to the plaintiffs all the rights of a legal mortgagee. It only gives some of the rights. The right to take possession is not given. The plaintiffs' security may be endangered by a person getting the legal estate without notice of the plaintiffs' charge. A mortgage must be a conveyance of something. This deed does not convey anything. It is a mere charge by deposit of title deeds, and the plaintiffs are not entitled to six months' notice or interest in lieu thereof before being paid off: *Fitzgerald's Trustee* v. *Mellersh.* (5) As Chitty J. pointed out in that case (6), the loan is only intended to be of a temporary character, and in *Jones* v. *Woodward* (7) Sargant J. said that " a document like this, which did not convey, and was enforceable only in equity, and which on the face of it was intended to be a security for a merely temporary advance, was not a mortgage, but an equitable charge within the exception." As Lindley M.R. said in *Santley* v. *Wilde* (8), " A mortgage is a conveyance of land . . . . as a security for the payment of a debt or the discharge of some other obligation for which it is given " ; and this passage was referred to with approval by Lord Halsbury L.C. in *Noakes & Co.* v. *Rice.* (9) And in *Durham Brothers* v. *Robertson* (10) Chitty L.J. said: " In a well-known judgment of the Exchequer Chamber in *Halliday* v. *Holgate* (11) the late Willes J., in delivering the judgment of the Court, distinguished between lien, pledge, and mortgage, and spoke of a mortgage as passing the property out and out." The Act was not intended to apply to temporary loans on the security of the deposit of deeds, but only to mortgages of a

(1) (1877) 7 Ch. D. 166.
(2) [1898] 1 Q. B. 765.
(3) [1915] 1 Ch. 22.
(4) [1916] 1 K. B. 706.
(5) [1892] 1 Ch. 385.
(6) Ibid. 389.
(7) [1917] W. N. 61; 116 L. T. 378.
(8) [1899] 2 Ch. 474.
(9) [1902] A. C. 24, 28.
(10) [1898] 1 Q. B. 772.
(11) (1868) L. R. 3 Ex. 299.

permanent character. It was never intended to interfere with and render difficult temporary advances by bankers for commercial and other purposes. The deed, therefore, is not a mortgage within s. 1, sub-s. 4, of the Act, and, even if it is, it is an "equitable charge" within the exception in s. 2, sub-s. 4 (*b*). The deed gives the plaintiffs power to get in the legal estate and make themselves mortgagees, but they have not done so. They still have only an equitable charge. [Sect. 2 (vi.) of the Conveyancing Act, 1881, as to the definition of mortgage, and ss. 19 and 21 as to the statutory power of sale, were also referred to.]

Whateley in reply. The definition of "mortgage" in s. 2 of the Conveyancing Act, 1881, includes any charge on any property for securing money or money's worth. That would cover this deed, and ss. 19 and 21 give the mortgagee a statutory power to sell and to convey his interest in the land. [*In re Hodson and Howes' Contract* (1) was referred to.]

Cur. adv. vult.

Feb. 9. PICKFORD L.J. read the following judgment:—In this appeal from Shearman J. a question arises upon the construction of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1, sub-s. 4, and s. 2, sub-s. 4. The facts under which it arises are simple and not in dispute. The defendant, a butcher at Berkhamsted, wished to obtain an overdraft from the plaintiffs, his bankers, and gave as security the title deeds of some property, including the house and shop where he carried on business. He also signed a document in relation to the property of the usual stringent form employed by bankers. So far as is relevant to this case it is as follows: [The Lord Justice read the greater part of the document.] This document does not convey the property to the plaintiffs, but it confers practically all the powers of mortgagees upon them, and enables them without the assistance of the Court to vest the property in themselves. The plaintiffs now sue the defendant for the money advanced, and he alleges that no such action can be brought by reason of the provisions of the Act I have mentioned. They are as follows: [The Lord Justice read s. 1, sub-s. 4, and s. 2, sub-s. 4 (*a*), (*b*).] The question is whether by the combined effect of the

(1) (1887) 35 Ch. D. 668.

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enacting words in s. 1 and the exception in s. 2 this transaction is one in which the borrower is protected from the claim of the lender.

I think it is a difficult question, and is made more so by the employment in the Act of two expressions in common use but of uncertainly defined meaning, i.e., mortgage and equitable charge. Mortgage is used in different meanings in different places, e.g., the wide definition in the Conveyancing Act, 1881, and the narrower meaning sometimes attributed to it of a legal mortgage conveying the legal estate; and equitable charge is not always used in the same sense. In this Act there is no definition of either expression. It was argued before us that the definition could be determined by regarding the intention of the Act, which, it was contended, was to protect what may be called the permanent mortgagors of small property, and not to interfere with temporary securities given as in this case. The distinction between such transactions was pointed out by Chitty J. in the case of *Fitzgerald's Trustee* v. *Mellersh*. (1) I think that this probably was the intention of the Act, but I do not think it concludes the question. The words of an Act of Parliament may often go beyond the original intention of its framers, and the elaborate and drastic documents by which bankers seek to protect themselves may pass the line between mortgages and charges unintentionally. It is this latter consideration which has given me the greatest difficulty in this case.

On the whole I have come to the conclusion that the construction put upon the Act by Shearman J. is correct, i.e., that "mortgage" is used in it with the meaning attached to the word by Lindley M.R., in *Santley* v. *Wilde*. (2) The learned Master of the Rolls there says: "A mortgage is a conveyance of land . . . . as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding." It may be of course, as in the case of a second mortgage, that the legal estate is outstanding in some other person, but I think the expression in this Act means a conveyance of the property. The same view was, I think, taken by Sargant J. in *Jones* v. *Woodward* (3), where he said:

(1) [1892] 1 Ch. 385. (2) [1899] 2 Ch. 474.
(3) [1917] W. N. 61; 116 L. T. 378.

"By a mortgage was meant an instrument which conveyed the property out and out, but gave a right to redeem." He also said: "A document like this" (i.e., the document before him), "which did not convey, and was enforceable only in equity, and which on the face of it was intended to be a security for a merely temporary advance, was not a mortgage but an equitable charge within the exception." The document in that case was of a much less stringent character than the one before us, and was not enforceable without the aid of the Court, and it is the very stringent conditions of this document which cause the difficulty. Those which have caused me the greatest difficulty are those which provide that the plaintiffs are to be deemed mortgagees, and that the defendant will hold all his estate and interest charged in trust for the plaintiffs as mortgagees, with a power to the plaintiffs to remove him from the trust and appoint themselves as trustees, thereby obtaining power to vest in themselves his whole interest including the legal estate. There is therefore no need for the plaintiffs to obtain the assistance of the Court to enforce their security, and in this important respect the case differs from that before Sargant J.; but, looking to what I think is the proper construction of the word "mortgage," I think this still leaves them in the position of persons who have an equitable charge by deposit of deeds or otherwise, and not in that of mortgagees, i.e., persons who have a conveyance of the property subject to redemption.

I think, therefore, the appeal should be dismissed with costs.

BANKES L.J. read the following judgment:—This is an appeal from Shearman J. It raises an important point as to the proper construction to be placed upon certain sections of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97). That Act was passed, as its title implies, inter alia, for the purpose of restricting during the continuance of the present war the calling in of securities on small dwelling-houses. Sect. 1, sub-s. 4, of the Act prescribes the acts which it shall not be lawful for a mortgagee to whom the Act applies to do, if and so long as the mortgagor complies with the covenants to the extent indicated in the section. The acts are (*a*) the calling in of the mortgage; (*b*) the taking of any steps for exercising any right of foreclosure or sale, or

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for otherwise enforcing the security, or for recovering the principal money thereby secured. Sect. 2, sub-s. 4, defines the mortgages to which the Act shall apply, namely (with certain exceptions), every mortgage where the mortgaged property consists of or comprises one or more dwelling-houses to which the Act applies. Among the exceptions is (sub-s. (*b*)) "an equitable charge by deposit of title deeds or otherwise." The question which has to be decided in this appeal depends, in my opinion, upon the construction to be placed upon the language of this exception.

The question arises in this way: The defendant Tompkins was a customer of the plaintiff bank. To secure his overdraft he deposited the title deeds of his property, which included small dwelling-houses within the meaning of the Act, and at the same time executed a deed in the printed form adopted by the bank whereby he declared the terms upon which the deeds were deposited, and went on to give certain undertakings, and to make certain declarations, which may be summarized as follows:—1. An undertaking to pay the amount of the overdraft on demand. 2. A declaration that the bank should be deemed to be mortgagees under the deed of all the premises thereby charged. 3. An undertaking to execute upon request a legal mortgage containing a provision that the mortgagees' rights and privileges might be exercised immediately. 4. A declaration that the bank might exercise, at any time after demand for payment of the moneys due had been made, such power of sale or other powers as by statute should for the time being be exercisable by a mortgagee after default made in payment of the mortgage money. 5. A declaration that during the continuance of the security the defendant would hold the property comprised in the security as trustee for the bank, and an undertaking to convey the same as directed by the bank. 6. An authority to the bank to remove the defendant at any time from the trusteeship and to substitute any nominee of their own in his place, and to make a declaration vesting all the defendant's estate and interest in the trustee so appointed. 7. An irrevocable appointment of certain officials of the bank to act as the defendant's attorneys for the purpose of executing documents including a conveyance of the premises.

The deed is dated December 14, 1912. On February 12, 1917, the bank issued a writ claiming the amount of the overdraft. The writ

was specially indorsed, and the claim made is for money due to the bank upon a banking account. No reference was made upon the writ to the deed. By his defence the defendant set up that his case fell within the protection of the statute, and that the bank was suing him for the recovery of the principal money secured by the mortgage deed, which was forbidden by the Act. Shearman J. decided in favour of the bank. He held in substance that the operation of the Act was confined to legal mortgages, that is to say, to mortgages which contain a conveyance of the property included in them. I cannot take this view of the Act. I see nothing in the Act to limit the meaning to be attached to the expression "mortgage" except such words in the Act itself as expressly limit the meaning. On the contrary, I think the fact that certain classes of mortgages are expressly excluded indicates that all classes except those excluded are intended to be included. Apart, therefore, from any words of exclusion, equitable mortgages are included within the protection of the statute. The material words of exclusion I have already referred to. If the sub-section had been confined to equitable charges by deposit of title deeds no difficulty could have arisen. The difficulty arises from the addition of the vague and indefinite words "or otherwise." If the whole sentence is somewhat expanded and the words used in their natural meaning, it would read: "An equitable charge whether created by deposit of title deeds or in any other way." So read it follows that all equitable charges are excluded from the operation of the Act. I doubt whether this was the intention of the framers of the Act. I have struggled to see whether I could find any satisfactory limitation which could be placed upon the language of the sub-section which would bring it more into accordance with what I conceive to have been the intention of the Legislature as gathered from the rest of the statute. I have failed, and I can see no alternative having regard to the language of the sub-section, which though vague and indefinite is unambiguous, and must include the present equitable charge, even though its provisions place the mortgagees, from the point of view of the protection apparently intended to be conferred by the statute, in substantially the same position as if the mortgage had been a legal mortgage. I think that the appeal fails.

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SCRUTTON L.J. read the following judgment:—By the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 4, it shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as certain conditions are fulfilled (which have in this case been fulfilled), to call in his mortgage or take any steps for recovering the principal money thereby secured. The Act applies to every mortgage in which the mortgaged property comprises a certain class of small dwelling-house, but does not apply "to an equitable charge by deposit of title deeds or otherwise."

The London County and Westminster Bank has allowed Mr. Tompkins an overdraft on his entering into a deed which gives the bank as security for the loan certain rights over property including dwelling-houses of the class mentioned in the Act; they are endeavouring to recover the loan. If the deed is a mortgage to which the Act applies, they cannot; if it is an equitable charge, they can. This is the only question in the case. Shearman J., following a principle laid down by Sargant J., has held that the deed is not a mortgage, but is an equitable charge, and that the bank can recover. Mr. Tompkins appeals.

Sargant J.'s decision, *Jones* v. *Woodward* (1), which for some reason I do not understand is only reported in the *Weekly Notes* and not in the *Law Reports*, was given in a case where a builder gave a charge on certain dwelling-houses to secure all money due and to become due, and agreed to give the lender formal and proper charges within a fortnight. The learned judge held that the contrast in the Act was between mortgages which conveyed the property out and out but gave a right to redeem and transactions which did not convey and were only enforceable in equity as securities for a merely temporary advance. He held the document before him belonged to the latter class. Shearman J. takes a slightly different view of the matter. He says that there are mortgages which convey the property which is security for the loan conditionally, that is, subject to a right to redeem, which are legal mortgages; there are securities which do not do this, but convey a right to call for the legal estate, as second mortgages, or agreements to execute a legal mortgage, which class he calls equitable mortgages; and lastly there are

(1) [1917] W. N. 61; 116 L. T. 378.

documents which merely create a charge on property and give no right to call for the legal estate, which he describes as equitable charges; and he holds that the term "mortgage" in this Act covers only the first of these classes and the term "equitable charge" covers the second and third. This is, I think, a different view from Sargant J.'s. The latter judge would, I think, hold a second mortgage, though it only mortgages the equity of redemption and requires the assistance of equity to enforce it, a mortgage, and not an equitable charge. On the view of Shearman J. the exception is inserted ex majori cautela, for its subject-matter is not included in the enacting part. Another view is that mortgage may mean the first and second classes, and equitable charge may mean the second and third classes; in this case the exception does cover part of the enactment, i.e., equitable mortgages, and also includes another subject-matter ex majori cautela, namely, equitable charges. There is no definition of "mortgage" in the Act in question, unlike the Conveyancing Act, 1881, s. 2, where mortgage includes "any charge on any property for securing money or money's worth"; in the present Act all that it said is that mortgage includes a land charge under the Land Transfer Acts, 1875 and 1897, which charges do not pass an interest in the land itself. One would desire to see if possible some reason why the Legislature should stay the enforcement of mortgages during the war and leave unfettered the enforcement of equitable charges; and if it were the fact that the latter as defined could not be enforced against the land without the assistance and only in the discretion of a Court of Equity, while in mortgages the land could be dealt with without such assistance, there would be a reason for the distinction. The Courts for some time have drawn a distinction between formal securities by deed conveying the legal estate and informal securities by deposit of deeds and memoranda of charge, usually for a varying amount, to be made at short notice and repaid at short notice. Chitty J. in *Fitzgerald's Trustee* v. *Mellersh* (1) declines to apply the rule entitling a mortgagee to six months' notice to repay, or six months' interest in lieu of notice, to equitable mortgages by deposit of deeds with a memorandum of deposit. He distinguishes between formal and permanent and informal and temporary securities, such as are used in the majority

(1) [1892] 1 Ch. 385, 389.

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of bankers' overdrafts on security. It may well be that the exception in the Act under consideration was intended to protect these bankers' charges, in their main features equitable, which would not be made if they could not be enforced during the war. The question is whether the words used have attained this object.

It is not easy to find any judicial distinction of mortgages legal and equitable and equitable charges. If one looks at a standard work like Fisher on Mortgages one finds this classification: 1. Mortgages are a form of security created by contract conferring an interest in property, defeasible on performing the condition of paying a given sum of money. They may be (*a*) legal, where the legal ownership of the property is transferred to the mortgagee; or (*b*) equitable, where the legal ownership remains vested in the owner or some other person, e.g., a trustee or first mortgagee, and the security can consequently only be enforced under the equitable jurisdiction of the Court, which carries it into effect either by giving the creditor immediately the appropriate remedies, or by compelling the debtor to execute a security in accordance with the contract. 2. Another class of security which includes "equitable charges" and equitable assignments, where there is appropriation of property for the discharge of a debt or engagement without giving the creditor either an absolute or special property in the subject of the security. The transaction does not pass either an absolute or special property to the creditor or any right of possession, but only a right of realization by judicial process in case of non-payment of the debt. And of this class "a charge" is where property is expressly or constructively made liable or specially appropriated to the discharge of a burden; no debt is implied, but a right of realization by judicial process is conferred.

But though this is the text-book classification, in which legal mortgages are distinguished from equitable mortgages and charges by the fact that in the latter case the aid of the Court is required to get the property or its possession, equity judges appear to use the terms with no such precise distinction. Fry L.J. in *In re Richardson* (1) speaks of a deposit of deeds to secure an overdraft without any memorandum of deposit indifferently as an equitable mortgage, an equitable charge, and an equitable security. And

(1) (1885) 30 Ch. D. 396.

whereas it is often stated that an equitable mortgagee can foreclose, but the holder of an equitable charge can only obtain a sale, the authorities in equity, which used to hold that a deposit of title deeds to secure a loan gave no right to foreclose, now allow foreclosure, holding that such a deposit involves an agreement to execute a mortgage: see *Harrold* v. *Plenty* (1); *Stubbs* v. *Slater*. (2) In the Act under consideration "equitable charges by deposit of title deeds" are excluded; and it is difficult to see any reason why Parliament should stay action in respect of such loans on such deposits as implied an undertaking to execute a legal mortgage, which could only be enforced in equity, and refuse to stay action in respect of such deposits as only implied a pledge or charge and could only be enforced by an order for sale: *Carter* v. *Wake*. (3)

Further, the text-book classification does not seem to take account of the subtle devices which the ingenuity of conveyancers has introduced in favour of lenders who do not desire to get the legal estate at once but desire to be able to get it without the intervention of the Court. Though the Conveyancing Act, 1881, s. 19, gives a power of sale of the mortgaged property to the person entitled to a charge, it has been held that it does not entitle an equitable mortgagee to transfer the legal estate, which he has not got: *In re Hodson and Howes' Contract* (4); but, though such a mortgagee does not get the legal estate under his document of mortgage, two clauses have been inserted by which he may get it of his own motion without coming to the Court, and both these clauses are in the document in question in this case. The first is a clause by which the borrower declares to hold the charged property as trustee for the lender (in which case the legal estate is still in the borrower, but an equitable estate is created in the lender), authorizes the lender to remove him as trustee and to appoint new trustees with a declaration vesting the borrower's estate in the new trustees. This, as was held in *London and County Banking Co.* v. *Goddard* (5), enables the lender to get the legal estate in himself without the intervention of the Court. Further, under s. 8 of the Conveyancing Act, 1882, the borrower appoints the lender his irrevocable attorney to execute a

(1) [1901] 2 Ch. 314.
(2) [1910] 1 Ch. 632, 639.
(3) (1877) 4 Ch. D. 605.
(4) 35 Ch. D. 668.
(5) [1897] 1 Ch. 642.

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conveyance of his legal estate on a sale by the lender as mortgagee. Both these clauses are present in the document under consideration.

That document is a deposit of deeds as a security for present or future overdraft; a "charge" of all the borrower's present and future estate with payment of moneys due on demand; an undertaking to execute a legal mortgage if requested; the creation of a power of sale, and the creation of two powers by which the lender may in the future get and transfer the legal estate, though he has not got it at present, without the intervention of the Court. I think this is an equitable mortgage within the meaning of that term as ordinarily used, and is not made the less so by the fact that the lender can in the future get the legal estate without coming to the Court; and as an equitable mortgage I think it comes within the enacting part of the Act. But I think it is taken out of the enacting part by the exception, in which, in my view, the term "equitable charge" is used to mean equitable security in the wide sense, a security not intended to be of a permanent character and therefore made in an informal way which needs equitable assistance to enforce it in most cases and in most respects, and where, therefore, there will usually be some control of the Court over its enforcement. I think the effect of giving too wide a meaning to the enacting restriction, which applies to future as well as present transactions, will be to hinder borrowers from obtaining temporary loans from banks on deposit of security, and that this probably explains the reason of the statutory exception. I arrive at the same result as the judge below and Sargant J., though I am not sure that I do so for the same reasons.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Lovell, Son & Pitfield, for Penny & Son, Berkhamsted.*

Solicitors for defendant: *Stanley Evans & Co., for E. H. Sedgwick, Berkhamsted.*

W. F. B.

[COURT OF CRIMINAL APPEAL.]

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Feb. 8, 11.

THE KING *v.* VOISIN.

Criminal Law—Evidence—Admissibility—Written Statement voluntarily made—Prisoner detained for Inquiries.

A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The question whether a person has been duly cautioned before making a statement is a circumstance to be taken into account by the judge in exercising his discretion whether to exclude the statement, but the absence of a caution does not as a matter of law make the statement inadmissible.

The body of a woman was found in a parcel, a piece of paper with the words "Bladie Belgiam" written upon it being also in the parcel. The police, in the course of their investigations, requested the appellant to go to a police station and account for his movements. After making a statement he voluntarily, at the request of the police to write the words "Bloody Belgian," wrote the words "Bladie Belgiam." He had not been cautioned before making the statement or writing the words. At that time the police had not decided to charge the appellant with having murdered the woman, although they were detaining him in custody for inquiries. The appellant was subsequently tried for the murder of the woman and convicted:—

Held, that the writing by the appellant was admissible in evidence notwithstanding that he had not been cautioned before writing the words.

Statement of law in *Ibrahim* v. *Rex* [1914] A. C. 599, 609, followed.

Appeal from a conviction.

The appellant, Louis Marie Joseph Voisin, a Frenchman, was tried at the Central Criminal Court before Darling J. on January 16, 17, 18, 1918, for the murder of a woman named Emilienne Gerard. The trunk of the body of the murdered woman had been found in a parcel in Regent Square, a piece of paper with the words "Bladie Belgiam" upon it being also found in the parcel. The police, in the course of their investigations, requested the appellant to go to Bow Street Police Station and account for his movements at the

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supposed time of the murder. He made a statement which was taken down in writing. He was afterwards asked whether he had any objection to write the words "Bloody Belgian." He said, "Not at all," and then wrote the words "Bladie Belgiam." The appellant was not cautioned by the police before he made the statement or wrote the words. At that time the head and hands of the murdered woman had not been discovered and the trunk had not been identified, and the police, although they were detaining the appellant in custody for inquiries, had not decided to charge him with the crime. It was contended at the trial that the writing with the words "Bladie Belgiam" upon it was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the appellant and while he was in custody; the writing, however, was admitted as evidence. The jury found the appellant guilty of murder, and he was sentenced to death.

He appealed against his conviction upon the grounds of the misreception of evidence and of misdirection.

L. Morgan May, for the appellant. The paper with the words "Bladie Belgiam" upon it which the appellant wrote at the request of the police ought not to have been admitted in evidence. At the time the appellant wrote the words he was, as Darling J. said, to all intents and purposes in custody; he never regained his liberty. The writing was obtained by the police officers acting outside the scope of their authority and without cautioning the appellant. A prisoner who is in custody must not be questioned except in accordance with the provisions of the Criminal Evidence Act, 1898. Even if the appellant had not actually been charged with the crime at the time he wrote the words, if he thought he was under arrest the result would be the same as if he were actually under arrest. Lord Sumner in *Ibrahim* v. *Rex* (1) said that the rule of English criminal law was "that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." Lord Sumner also stated that

(1) [1914] A. C. 599, 609, 610.

the point had frequently arisen "whether, if a policeman questions a prisoner in his custody at all, the prisoner's answers are evidence against him, apart altogether from fear of prejudice or hope of advantage inspired by a person in authority."

[LUSH J. There is a difference between the admissibility of a statement and the admissibility of handwriting. A statement may be made under such circumstances that the true facts are not brought out, but it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats.]

Handwriting obtained by means of threats is not admissible because an accused person ought not to be compelled to assist the police in taking proceedings against him. The admissibility of any evidence so obtained which may be detrimental to the accused ought to be scrutinized very closely. In *Reg.* v. *Gavin* (1) A. L. Smith J. laid it down that when a prisoner is in custody the police have no right to ask him questions, and that an admission obtained in that way is inadmissible in evidence. Cave J. in *Reg.* v. *Male* (2) also rejected a statement made by a prisoner after arrest in answer to questions put by the police. He pointed out that the law does not allow the judge or jury to put questions in open Court to prisoners, and that it would be monstrous if the law permitted a police officer to put a prisoner through an examination and then produce the effects of that examination against him. It is true that in *Reg.* v. *Brackenbury* (3) Day J. expressly dissented from the ruling of A. L. Smith J. in *Reg.* v. *Gavin* (1) and admitted a statement made by the accused in answer to questions put by a policeman, but there the admissions were made before the man was taken into custody and after he had been cautioned. Lord Russell of Killowen C.J. said in *Rogers* v. *Hawken* (4) that the observations made by Cave J. in *Reg.* v. *Male* (2) were perfectly just. Hawkins J. in *Reg.* v. *Histed* (5) excluded the answers made by a prisoner in custody to questions put by a policeman who had not previously cautioned the prisoner. He pointed out that "no one, either a policeman or anyone else, has a right to put questions

(1) (1885) 15 Cox, C. C. 656.
(2) (1893) 17 Cox, C. C. 689.
(3) (1893) 17 Cox, C. C. 628.
(4) (1898) 67 L. J. (Q.B.) 526.
(5) (1898) 19 Cox, C. C. 16.

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to a prisoner for the purpose of entrapping him into making admissions."

[LUSH J. This Court in *Rex* v. *Best* (1) held that a statement made by a prisoner in custody was not rendered inadmissible in evidence merely because it was made in answer to a question put to him by a police constable, and further that *Reg.* v. *Gavin* (2) was not a good decision.]

Rex v. *Best* (1) is distinguishable, because the prisoner in that case had been cautioned by the policeman before the question was put. The Court did not overrule *Reg.* v. *Gavin* (2); it merely said that the statement of law as reported was too wide and required qualification.

[LUSH J. The head-note in *Lewis* v. *Harris* (3) is that "there is no rule of law excluding statements made by an accused person to a constable in reply to an inquiry, even though the constable has given him no caution, provided that the constable, when he made the inquiry, had not made up his mind to take criminal proceedings against him, and provided that the constable makes no threat and holds out no inducement to the accused person to make the statement."]

That case turned entirely upon the point that the justices were wrong in excluding the statement merely because no caution had been administered. In *Rex* v. *Knight and Thayre* (4), where a man had been subjected to a very long interrogation before arrest by a person in authority over him, Channell J. admitted the earlier answers, but rejected the statements made during the latter part of the interrogation. Cockburn C.J. in *The Yeovil Murder Case* (5) said that "the law did not allow a man under suspicion and about to be apprehended to be interrogated at all." Even if the handwriting is admissible in evidence, the Court ought in the exercise of its discretion to have excluded it.

The judge in his summing-up omitted to put to the jury certain evidence in favour of the appellant, and also commented on the fact that the appellant did not go into the witness-box and give evidence. Those passages in his summing-up when taken together

(1) [1909] 1 K. B. 692.
(2) 15 Cox, C. C. 656.
(3) (1913) 78 J. P. 68.
(4) (1905) 20 Cox, C. C. 711.
(5) (1877) 41 J. P. 187.

amount to misdirection. It was held in *Reg.* v. *Rhodes* (1) that the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), has not deprived the Court of the right to comment on the failure of the prisoner to give evidence at the trial; but it would appear from *Kops* v. *Reg.* (2) that such comments ought to be both legitimate and necessary. In the present case those limits were exceeded. The Criminal Evidence Act, 1898, was not intended to do away with the elemental principle that the prosecution must prove their case against the prisoner.

R. D. Muir and *Percival Clarke*, for the Crown, were called on with regard to the admissibility of the writing. The fact that the appellant wrote the words on the piece of paper at the request of the police but without being cautioned does not make the writing inadmissible in evidence; the "objections . . . . go to the weight and not to the admissibility of the evidence": per Lord Sumner in *Ibrahim* v. *Rex.* (3) A statement is admissible in evidence, even though made after the person making it is in custody, provided it is made voluntarily and not from fear of prejudice or hope of advantage exercised or held out by a person in authority. The statement of the law by Lord Sumner in *Ibrahim* v. *Rex* (4) was approved by this Court in *Rex* v. *Colpus.* (5) Channell J. pointed out in *Rex* v. *Knight and Thayre* (6) that there is no distinct rule of evidence that if questions are asked by a constable after arresting a prisoner, or after he has decided to charge him, the answers to them are inadmissible, but the judge at the trial may in his discretion refuse to allow the answers to be given in evidence. The same judge in *Rex* v. *Booth and Jones* (7) said that "there is no actual authority yet that if a policeman does ask questions it is inadmissible; what happens is that the judge says it is not advisable to press the matter." If a caution is given to a man from whom it is sought to obtain valuable information about a crime the effect will probably be to prevent the information being obtained. At the time the appellant wrote the words the body of the murdered woman had not been identified, the head and hands not having been discovered. The

(1) [1899] 1 Q. B. 77.
(2) [1894] A. C. 650, 653.
(3) [1914] A. C. 610.
(4) [1914] A. C. 609.
(5) [1917] 1 K. B. 574, 579.
(6) 20 Cox, C. C. 711.
(7) (1910) 5 Cr. App. R. 177, 179.

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police only decided to arrest the appellant when subsequently the head and hands were found. No threat or inducement was held out to the appellant to induce him to write the words.

L. Morgan May in reply. The question as to the admissibility of this evidence must be decided according to the whole of the circumstances of the case: *Reg.* v. *Miller.* (1) When all the facts in the present case are taken into account it is clear, on the principle laid down in *Reg.* v. *Thompson* (2), that this writing is not admissible.

Cur. adv. vult.

Feb. 11. The judgment of the COURT (A. T. Lawrence, Lush, and Salter JJ.) was read by

A. T. LAWRENCE J. The prisoner and a woman named Berthe Roche were indicted for the murder of Emilienne Gerard. A verdict of not guilty was directed by the judge in the case of Roche. The jury found the prisoner Voisin guilty of murder and he was sentenced to death.

He has appealed to this Court against his conviction upon the grounds of misdirection and misreception of evidence. The argument on misdirection may be dealt with quite shortly. Mr. May, who appeared for the prisoner and presented his case with considerable skill, had to admit that the passages from the summing-up upon which he relied as misdirection did not in themselves amount to directions in point of law, but were comments upon the evidence from which he said the jury would infer that the judge was of opinion that the prisoner was guilty. He argued that as there were three or four such passages in the summing-up they had a cumulative effect and amounted together to misdirection in law. We think this argument is founded upon an erroneous view of the law. Comments on the evidence which are not misdirections do not by being added together constitute a misdirection. The only ground of appeal where such cumulative effect of a judge's observations is relied on is where it can be said that they have caused or contributed to cause a miscarriage of justice. Mr. May could not, and did not, suggest that there had been any miscarriage of justice in this case, and it is plain to us that the learned judge was throughout endeavouring,

(1) (1895) 18 Cox, C. C. 54. (2) [1893] 2 Q. B. 12.

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in the case of a very horrible murder, to be scrupulously fair to the prisoner. The judge's comments upon the prisoner not going into the witness-box and his not calling the woman Roche after her discharge were within his judicial discretion and are not matters for this Court to review. It was a case demanding explanation by the only persons who could know the facts if ever a case did. For both the rooms occupied by the prisoner and Roche and those occupied by the victim contained many traces of human blood, and in the prisoner's cellar were found the head and hands of the dead woman. Both the prisoner and Roche had keys of the deceased's flat, and the prisoner had the key of his cellar in his pocket.

The alleged misreception of evidence relates to a paper writing containing the words " Bladie Belgiam." This was written by the prisoner at the request of the police at a time while he was being detained at Bow Street. The trunk of the body of the murdered woman had been found contained in a parcel in Regent Square with a label containing these words upon it. The police were making investigations. They had requested the prisoner to go to Bow Street and to account for his movements at the supposed time of the murder. He had just made a statement which had been taken down in writing, and after he had done so he was asked whether he would have any objection to write down the two words " Bloody Belgian." He said " Not at all " and then wrote them down as above. It was argued that that writing was inadmissible in evidence on the ground that it was obtained by the police without having first cautioned the prisoner and while he was in custody. A number of cases were called to our attention in which different views had been entertained by judges as to when statements by prisoners should and when they should not be excluded from consideration by the jury. It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend upon the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim* v. *Rex* (1) as follows : " It has long been established as a positive rule of English criminal law, that no statement by an

(1) [1914] A. C. 599, 609, 610.

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accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." The point of that passage is that the statement must be a voluntary statement; any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibility. The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed. In this case the prisoner wrote these words quite voluntarily. The mere fact that the words were written at the request of police officers, or that he was being detained at Bow Street, does not make the writing inadmissible in evidence. Those facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that upon the label, or account for the same misspellings occurring in both. There was nothing in the nature of a "trap" or of the "manufacture of evidence"; the identity of the deceased woman had not at this moment been established, and the police, though they were detaining the prisoner in custody for inquiries, had not then decided to charge him with this crime; indeed, if the writing had turned out other than it did and other circumstances had not subsequently transpired, it is certain that he, like others who were similarly detained, would have been discharged. It is desirable in the interests of the community that investigations into crime should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made under the circumstances here proved was inadmissible in evidence.

We think an error has crept into Lord Sumner's judgment in

Ibrahim's Case (1) where he is made to say that the actual decision in *Rex* v. *Best* (2) " was that under the proviso of s. 4 of the Criminal Appeal Act, 1907, the Court would not interfere." As reported in the *Law Reports* there is no allusion in *Rex* v. *Best* (2) to the proviso of s. 4. We read that case as deciding that the mere fact that a statement is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner. Even if we disagreed with the mode in which the judge had in this case exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This was evidence admissible in law, and it could not be fairly inferred from the other circumstances that it was not voluntary.

In 1912 the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. (3) These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners,

(1) [1914] A. C. 613.
(2) [1909] 1 K. B. 692.

(3) "POLICE ENQUIRIES.

Memorandum by H.M. Judges of the King's Bench Division.

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words 'be given in evidence.'

Alverstone, C.J.
October, 1912."

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contrary to the spirit of these rules, may be rejected as evidence by the judge presiding at the trial.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for Crown: *Director of Public Prosecutions.*

R. F. S.

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Feb. 5, 6, 12.

BLACKBURN BOBBIN COMPANY, LIMITED *v.* T. W. ALLEN & SONS, LIMITED.

[1917 B. 722.]

Contract—Sale of Goods—Impossibility of Performance due to Outbreak of War—Discharge—"Building or work"—Courts (Emergency Powers) Act, 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* 1.

By a contract made in the early part of 1914 the defendants sold to the plaintiffs timber to be imported from Finland and to be delivered to the plaintiffs free on rail at Hull, deliveries to commence in June or July, 1914, and to continue during the season which would terminate in November. The contract did not contain the exceptions of war or force majeure. The practice before the war was to load timber into vessels at ports in Finland for direct sea carriage to England, but this practice was not known to the plaintiffs, nor did they know, as the fact was, that timber merchants in England do not keep Finland timber in stock. Up to the outbreak of the war in August, 1914, the defendants had not delivered any of the timber, and after that date, owing to the disorganization of transport caused by the war, it became impossible for the defendants to obtain any Finland timber for delivery to the plaintiffs, and the defendants contended that the contract had been dissolved by the outbreak of war:—

Held, that the contract had not been dissolved, and that the defendants were liable in damages for the non-delivery of the timber.

Jacobs, Marcus & Co. v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589 applied.

The timber was intended by the plaintiffs to be used for the making of bobbins for use in spinning mills:—

Held, that the contract was not a contract for the supply of materials "for any building or work" within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917.

ACTION in the commercial list tried by McCardie J. without a jury.

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BLACKBURN BOBBIN COMPANY v. T. W. ALLEN & SONS.

The following statement of the facts is taken from the written judgment:—

"The claim is for damages for breach of contract. The plaintiffs are manufacturers of bobbins for spinning. Their office is at Blackburn. The defendants are timber merchants at Hull. In the early part of 1914 the defendants sold to the plaintiffs seventy standards of Finland birch timber at the price of 10*l.* 15*s.* per standard free on rail at Hull. Deliveries were to commence about June or July, 1914, and to continue during the season which would expire about November in that year. The contracts were not formal; they were created by correspondence. They contained no war or force majeure or suspension provisions. They were simple bargains of sale and purchase. Finland produces birch timber of a clean and pliable character. It is particularly useful for the purpose (inter alia) of manufacturing bobbins. The contract required that the timber to be supplied to the plaintiffs should come from Finland. Prior to the war the unvarying practice was to load the timber into vessels at ports in Finland for direct sea carriage to English ports. No timber was railed across Scandinavia for shipment from a Scandinavian port to England.

"Up to August, 1914, the defendants had made no deliveries to the plaintiffs. Then war broke out. Imports of timber from Finland stopped at once. German war vessels traversed the Baltic. Transport was paralysed. No vessels left Finland for Sweden. Swedish vessels ceased to sail for Finland. The vast disorganizing effect of the war on trade and transport need not be further indicated. It undoubtedly effected a revolution of circumstance, and rendered it impossible for the defendants to deliver the timber in accordance with their bargain. The English timber merchants who deal in Finnish timber do not hold stocks. Their timber as it arrived before the outbreak of war had gone to the customers to whom it had been already sold.

"Following upon the outbreak of war the defendants did not supply the plaintiffs with any portion of the timber to which the plaintiffs were entitled during the season of 1914. Correspondence took place between the parties up to November, 1914. Thenceforward no letter or communication passed between them until July, 1916. In that month the plaintiffs asked for delivery. The

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defendants then asserted for the first time that the contracts had been dissolved by the outbreak of war in 1914. The plaintiffs disputed this assertion; hence their claim to damages. The defence contains no plea that the contract was mutually abandoned, nor was any such point raised in argument."

C. Atkinson, K.C., and *du Parcq*, for the plaintiffs.

MacKinnon, K.C., and *Jowitt*, for the defendants.

[The arguments were directed to the principles to be deduced from the authorities which are referred to in the judgment.]

Cur. adv. vult.

Feb. 12. McCARDIE J. read the following judgment:—The main point at issue in this case is of far-reaching importance. The subordinate points possess a narrower legal interest. [The learned judge stated the facts as set out above, and continued:] The above brief statement of facts suffices for the purpose of considering the main point raised by the defendants, namely, that the contract between the parties was dissolved by the outbreak of war. The arguments were presented with fulness and great ability by Mr. MacKinnon, K.C., who was with Mr. Jowitt for the defendants, and by Mr. Cyril Atkinson, K.C., who was with Mr. du Parcq for the plaintiffs.

It is obvious that the principle raised by the case is one of vital and general importance. The question at issue is this: When will a change of circumstances (not due to the default of either party) cause a dissolution of contract? The law upon the matter is undoubtedly in process of evolution: see per Atkin J. in *Lloyd Royal Belge Société Anonyme* v. *Stathatos* (1) and per Pickford L.J. in *Hulton & Co.* v. *Chadwick & Taylor*. (2) The point must presumably be solved upon broad existing principles of contract law. Those principles, I conceive, should be the same whether the case be one of charterparty, building contract, or sale of goods: see per Lord Loreburn in the *Tamplin Case*. (3) But the application of the principles may vary with the terms and subject-matter of the

(1) (1917) 33 Times L. R. 390. (2) (1918) 34 Times L. R. 230.
(3) [1916] 2 A. C. 397, 404.

contract. Is there a conflict at the present time between the rules which are relevant to the present case? The original rule of English law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract: see per Curiam, *Paradine* v. *Jane*. (1) That principle was applied with full severity during the eighteenth century. I need not discuss the decisions in detail; many are referred to in Leake on Contracts, 6th ed., pp. 494-498. In some of those cases there was clearly a grave change of circumstance not within the contemplation of the parties at the time of the contract, yet it was held that no dissolution of contractual obligation took place. I mention the decisions referred to in Leake because it is, I think, essential to remember them if the pending evolution of principle proceeds. The original rule has again and again been restated. I only refer to *Spence* v. *Chodwick* (2), per Wightman J., and to *Ford* v. *Cotesworth* (3), per Blackburn J. To what extent has the original rule been modified by later decision? I do not think that the decision in *Esposito* v. *Bowden* (4) is relevant to the question, for the contract was there dissolved by reason of the absolute prohibition of commercial intercourse with an enemy. I doubt, moreover, if *Baily* v. *De Crespigny* (5) is a true modification of the doctrine. For there an Act of Parliament took away from both parties the subject-matter of the contract. The rights of each were destroyed and nothing was left upon which the contract could operate. There was more than a change of circumstance; there was a statutory seizure of the contract property. But the judgment of the Court undoubtedly rested to some extent on the principle of dissolution by a complete change of circumstance, and this view has apparently been approved by Lord Parmoor in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (6) The first true modification of the original rule was created, I think, by the doctrine of commercial frustration. I need not review the decisions on this doctrine; they are fully and historically

(1) (1647) Aleyn, 26.
(2) (1847) 10 Q. B. 517, 530.
(3) (1868) L. R. 4 Q. B. 127, 133.
(4) (1857) 7 E. & B. 763.
(5) (1869) L. R. 4 Q. B. 180.
(6) [1918] A. C. 119, 140.

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McCardie J.

considered in the judgments, both in the Common Pleas and the Exchequer Chamber, in *Jackson* v. *Union Marine Insurance Co.* (1) The effect of that decision is best stated by Brett J. (2) as follows: "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." If these words of Brett J. are to be applied to their widest extent they may well effect a revolution of contract law. It has been pointed out by Lord Loreburn that the rule stated in *Jackson* v. *Union Marine Insurance Co.* (3) is a mere application to commercial adventures of a broad contractual principle: see the *Tamplin Case.* (4) The next true modification of the original rule was finally effected by the decision in *Taylor* v. *Caldwell.* (5) There the contract was held dissolved by the destruction of its subject-matter. The doctrine of *Taylor* v. *Caldwell* (5) was extended by *Nicholl & Knight* v. *Ashton, Edridge & Co.* (6), and still more strikingly enlarged by the Coronation cases, of which *Krell* v. *Henry* (7) is the most vivid example, for in *Krell* v. *Henry* (7) the Court held that a collateral, though important, circumstance was the basis of the contract between the parties, and that when the basis ceased it followed that the contract was dissolved. *Krell* v. *Henry* (7) has been frequently cited and adopted in the highest tribunal.

So stood the decisions at the outbreak of the present war. Since that event judgments have been delivered as to the true effect of the decisions I have stated. On the one hand the original rule has been stated to exist in its integrity, whilst on the other hand the modification of the rule is deemed to be clearly settled: see per Lord Wrenbury in *Horlock* v. *Beal.* (8) The explanation of the lines of cases represented (*a*) by *Jackson* v. *Marine Union*

(1) (1873) L. R. 8 C. P. 572; (1874) L. R. 10 C. P. 125.
(2) L. R. 8 C. P. 581.
(3) L. R. 10 C. P. 125.
(4) [1916] 2 A. C. 404.
(5) (1863) 3 B. & S. 826.
(6) [1901] 2 K. B. 126.
(7) [1903] 2 K. B. 740.
(8) [1916] 1 A. C. 486, 525.

Insurance Co. (1) and (*b*) by *Krell* v. *Henry* (2) has been finally and authoritatively stated. It was put with clearness by Lord Shaw in *Horlock* v. *Beal* (3), where he said: "The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." It was stated with equal clearness by Lord Haldane in the *Tamplin Case* (4), where he said: "The occurrence itself may . . . . be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." In every case it is now necessary "to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract": per Lord Loreburn in the *Tamplin Case.* (5) It is obvious that what I will call the *Krell* v. *Henry* (2) rule as now formulated is theoretically capable of application to all contracts, whether as between shipowner and seamen, as in *Horlock* v. *Beal* (6), or to building contracts, as in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (7)

But by what tests and subject to what limitations is the *Krell* v. *Henry* (2) rule to be applied? No indication has yet been given as to the extent of its operation. At the outbreak of war a vast body of commercial contracts existed which contained no clauses whatever providing for that event. No one can doubt that such contracts had been made upon the assumption that peace would continue. Neither side contemplated the occurrence of war. But it cannot be that all such contracts were dissolved by the events of August, 1914. The mere continuance of peace was not a condition of the contract: see per Lord Loreburn in the *Tamplin Case.* (8) The destruction of a state of peace is not of itself a destruction of any specific set of facts within the *Krell* v.

(1) L. R. 10 C. P. 125.
(2) [1903] 2 K. B. 740.
(3) [1916] 1 A. C. 512.
(4) [1916] 2 A. C. 406, 407.
(5) Ibid. 403.
(6) [1916] 1 A. C. 486.
(7) [1918] A. C. 119.
(8) [1916] 2 A. C. 405.

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Henry (1) rule. Nor can it be that grave difficulty on the part of a vendor in procuring the contract articles will excuse him from the performance of his bargain. If such were the case, then the decision of the House of Lords in *Tennants* (*Lancashire*) v. *Wilson & Co.* (2) with respect to the force majeure clause there in question would have been unnecessary, for the contract would have been dissolved by a basic change of circumstances and the principle of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3) would have applied.

What, then, are the limits of the *Krell* v. *Henry* (1) rule as most recently exemplified by the last-named case, *Metropolitan Water Board* v. *Dick, Kerr & Co.?* (3) At the same time I deem it well to ask this further question: Have the recent decisions in the House of Lords impliedly overruled the judgment of the Court of Appeal in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais?* (4) There the defendants, a London firm, sold to the plaintiffs, London merchants, 20,000 tons of Algerian esparto to be shipped by a French company at an Algerian port on vessels to be provided by the plaintiffs. The defendants pleaded that performance of their contract had become impossible by reason of an insurrection in Algeria, and a consequent prohibition by the territorial Government of the collection and transport of esparto. It was held by the Court of Appeal (Brett M.R. and Bowen L.J.), affirming Manisty and Denman JJ., that such plea afforded no answer to the plaintiffs' claim for damages. The pith of the case was put by Bowen L.J. (5): "Now, one of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one,) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by vis major. 'The rule laid down in the case of *Paradine* v. *Jane* (6) has,' says Lord Ellenborough, 'been often recognized in Courts of law as a sound one; i.e. that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he

(1) [1903] 2 K. B. 740.
(2) [1917] A. C. 495.
(3) [1918] A. C. 119.
(4) 12 Q. B. D. 589.
(5) Ibid. 603.
(6) Aleyn, 26, 27.

might have provided against it by his contract."' (1) See also *Spence* v. *Chodwick* (2); *Lloyd* v. *Guibert*. (3) If inevitable necessity occurring in this country would not excuse non-performance, why should non-performance be excused on account of the inevitable necessity arising abroad? So to hold would be to alter the liability which English law attaches to contracts, and would, in the absence of an expressed or implied intention to that effect, be contrary to authority as well as principle, see *Barker* v. *Hodgson* (4); *Sjoerds* v. *Luscombe*." (5) The change of circumstances in *Jacobs' Case* (6) was serious and clearly was not foreseen by the parties. See also *Ashmore* v. *Cox*, per Lord Russell of Killowen C.J. (7)

To supply an answer to the above questions is a task of great difficulty in the absence of any authoritative guidance, for it calls not only for a reconciliation of apparently conflicting lines of cases, but it calls also for the ever-embarrassing duty of deciding whether an implied term shall be read into a given contract to the effect that dissolution shall take place if an uncontemplated and serious change of circumstances occurs. The decisions with respect to personal services throw, I feel, but little light on the matter, for it seems just and reasonable to imply a condition in such agreements that the contract shall be dissolved upon the death or physical incapacity of the person who has agreed to give his personal services: see *Robinson* v. *Davison*. (8) Death and illness are unceasing features of human society. I think, however, that assistance is derived from considering broadly the nature of the cases in which the *Krell* v. *Henry* (9) rule has been applied, whether before or after that decision in 1903. It will be observed that they apparently fall into several classes: First, where British legislation or Government intervention has removed the specific subject-matter of the construction from the scope of private obligation (*Baily* v. *De Crespigny* (10) is a good example of this class: see also *In re Shipton, Anderson & Co. and Harrison Brothers &*

(1) *Atkinson* v. *Ritchie* (1809) 10 East, 530, 533.
(2) 10 Q. B. 517, 530.
(3) (1865) L. R. 1 Q. B. 115, 121.
(4) (1814) 3 M. & S. 267.
(5) (1812) 16 East, 201.
(6) 12 Q. B. D. 589.
(7) [1899] 1 Q. B. 436.
(8) (1871) L. R. 6 Ex. 269.
(9) [1903] 2 K. B. 740.
(10) L. R. 4 Q. B. 180.

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Co. (1), the case of specific goods. I myself venture to think that this is an independent class of case, though, for the purpose of clearness, I classify it as falling within *Krell* v. *Henry* (2)); secondly, where the actual and specific subject-matter of the contract has ceased to exist, apart from British legislation or administrative intervention (*Taylor* v. *Caldwell* (3) is the best example of this class; *Horlock* v. *Beal* (4) is really, I think, a further example of this class); thirdly, where a specific set of facts directly affecting a specific subject-matter has ceased to exist (see *Jackson* v. *Union Marine Insurance Co.* (5), the case of a ship, and *Scottish Navigation Co.* v. *Souter & Co.* (6), also the case of a ship); fourthly, where a specific set of facts collaterally only affecting a specific subject-matter, but yet constituting the basis of contract, has ceased to exist (see *Nicholl & Knight* v. *Ashton, Edridge & Co.* (7), the case of a ship, and *Krell* v. *Henry* (2), the letting of specific premises); and, fifthly, where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance (*Metropolitan Water Board* v. *Dick, Kerr & Co.* (8)). I need not, of course, classify or illustrate the cases in which British legislation has directly prohibited the performance of a contract. In such cases the doctrine of illegality dissolves the bargains: see *Brewster* v. *Kitchell.* (9) In none of the cases in the above classes has it been stated or substantially suggested that the principle of *Krell* v. *Henry* (2) applies to the case of a bare sale of unascertained goods. The illuminating judgment of Scrutton L.J. in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (10) seems throughout to be dealing with specific subject-matters.

But the above classification, imperfect as I fear it is, does not exhaust the decisions which call for consideration, and here I must point out that in not a few of the decisions since the outbreak of the war the question of trading with the enemy has crept directly or indirectly into the determination of the matters in

(1) [1915] 3 K. B. 676.
(2) [1903] 2 K. B. 740.
(3) 3 B. & S. 826.
(4) [1916] 1 A. C. 486.
(5) L. R. 10 C. P. 125.
(6) [1917] 1 K. B. 222.
(7) [1901] 2 K. B. 126.
(8) [1918] A. C. 119.
(9) (1697) 1 Salk. 198.
(10) [1917] 2 K. B. 28, 29.

dispute. The doctrine of prohibition against any intercourse whether commercial or otherwise, with an enemy subject, is severe and far-reaching. I need only refer to *Esposito* v. *Bowden* (1), *Zinc Corporation* v. *Hirsch* (2), *Robson* v. *Premier Oil and Pipe Line Co.* (3), and *Ertel Bieber & Co.* v. *Rio Tinto Co.* (4) in the House of Lords. It is important to remember this point in approaching the cases which I next mention. Such cases apparently deal with a sale of unascertained goods. They are as follows :—(*a*) *Jager* v. *Tolme & Runge* (5) (Court of Appeal). The facts of this case were complicated, but the substance of the matter was that the vendors had agreed to deliver sugar f.o.b. Hamburg in August, 1914. The parties were British. The Courts held that the contract was dissolved by the outbreak of war. In my opinion, however, it is clear that the ratio of the decision was that performance of the contract would be illegal inasmuch as it would involve commercial intercourse with the enemy. The Court of Appeal ignored the expressly-raised contention that the contracts had been dissolved on the principle of *Krell* v. *Henry*. (6) The case of *Grey & Co.* v. *Tolme* (7) was decided by Bailhache J. on the same ratio. (*b*) *Smith, Coney & Barrett* v. *Becker, Gray & Co.* (8) Here, again, the facts were complicated. The parties were British firms. The vendors had agreed on August 1, 1914, to sell sugar f.o.b. or into warehouse Hamburg. In view of the special provisions in the contract the Court held that the contract was not dissolved. Had it held otherwise, I venture to think that the true ratio would again have been that performance would have involved trading with the enemy. But it is right to say that although the majority of the Court (Lord Cozens-Hardy M.R. and Swinfen Eady L.J.) did not apparently favour the application of the *Krell* v. *Henry* (6) rule, yet Phillimore L.J. seems to have thought that it might apply under certain circumstances—for instance, if the sugar had been wholly destroyed by fire. The point does not seem to have been fully argued, and such cases as *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (9) were not brought to the attention of the Court. (*c*) *Hulton & Co.* v. *Chadwick & Taylor*. (10) The

(1) 7 E. & B. 763.
(2) [1916] 1 K. B. 541.
(3) [1915] 2 Ch. 124.
(4) [1918] A. C. 260.
(5) [1916] 1 K. B. 939.
(6) [1903] 2 K. B. 740.
(7) (1915) 31 Times L. R. 551.
(8) [1916] 2 Ch. 86.
(9) 12 Q. B. D. 589.
(10) 34 Times L. R. 230.

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facts in this decision more closely approach the facts of the present case. It was recognized by Pickford L.J. that the principle of dissolution of contract by change of circumstances had been largely extended in operation. But I respectfully suggest that the true ratio of the decision of the Court of Appeal is to be found not so much in the change of circumstance, though serious in extent, as in the fact that an administrative intervention of the British Government had in substance prevented the fulfilment of the contract by the vendor in accordance with his obligations. *Hulton & Co.* v. *Chadwick & Taylor* (1) represents, in my view, an extension of the principle of *Brewster* v. *Kitchell* (2) or *Baily* v. *De Crespigny* (3) rather than a true extension of the broader principle of *Krell* v. *Henry*. (4) The former principle is one which admits of many applications in these days of administrative intervention, and in some cases the facts may be covered as much by *Krell* v. *Henry* (4) as by *Baily* v. *De Crespigny*. (3) The principles may overlap. The rule contended for by Mr. MacKinnon must have applied, if at all, as much to that case as to the present, for there had been in *Hulton's Case* (1) a revolution of circumstance, yet it is clear that Pickford L.J. rested his judgment on administrative intervention, that is to say, on *Baily* v. *De Crespigny* (3), rather than on the application of the *Krell* v. *Henry* (4) rule.

My conclusion upon the matter is that in the absence of any question as to trading with the enemy, and in the absence also of any administrative intervention by the British Government authorities, a bare and unqualified contract for the sale of unascertained goods will not (unless most special facts compel an opposite implication) be dissolved by the operation of the principle of *Krell* v. *Henry* (4), even though there has been so grave and unforeseen a change of circumstance as to render it impossible for the vendor to fulfil his bargain. If I were to hold otherwise, I should create a rule the results of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits.

By stating the above conclusion I maintain the original rule of English law whereby a man is bound by his contract whilst I leave a field as yet undefined for the operation and extension of the *Krell*

(1) 34 Times L. R. 230.
(2) 1 Salk. 198.
(3) L. R. 4 Q. B. 180.
(4) [1903] 2 K. B. 740.

v. *Henry* (1) principle. I am fortified in the view I express by the fact that *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2) has remained unchallenged amidst the testing breadth of recent decisions. I can see no sound distinction between impossibility of foreign law and impossibility created by an outbreak of war involving a complete cessation of transport facilities. Just as it seems clear that a vendor is not absolved from the duty to deliver unascertained goods by reason of the destruction of his factory or warehouse, so a vendor is not relieved from his obligation in such a case as the present. An ordinary and bare contract for the sale of unascertained goods gives no scope for the operation of the *Krell* v. *Henry* (1) rule, unless the special facts show that the parties have clearly (though impliedly) agreed upon a set of circumstances as constituting the contractual basis. Here no such agreement exists. In the present case, I ask the question put by Denman J. in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (3): "Looking at the nature of this contract, what is there to show that the intention of the parties was that the defendants should be relieved from the performance of their contract by reason of difficulties arising out of circumstances which were unforeseen?" My answer in the present case is that there is nothing to show such an intention. There is here no question of illegality or public policy, of actual prohibition or of intervention by the Government. There is merely an unforeseen event which has rendered it practically impossible for the vendor to deliver. That event the defendants could easily have provided for in their contracts. If I approved the defendants' contention, I should be holding in substance that a contract which did not contain a war clause was as beneficial to the vendor as a contract which contained such a provision.

In my view the rule in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2) holds good to-day, and I think that it covers the present case. I desire respectfully to add that in my opinion the *Krell* v. *Henry* (1) rule should not be unduly extended. It is only in exceptional cases that it can be safely applied. The difficulties of its application are amply indicated by the judgment of the Court of Appeal in *Herne Bay Steam Boat Co.* v. *Hutton* (4) and by the actual decision of the

(1) [1903] 2 K. B. 740.
(2) 12 Q. B. D. 589.
(3) Ibid. 597.
(4) [1903] 2 K. B. 683.

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majority of the Law Lords in the *Tamplin Case.* (1) The perils of the rule may appear in later years. If it be extended too far, it may tend to sap the foundations of contract law as they now exist. It is, I venture to say, of the utmost importance to a commercial nation that vendors should be held to their business contracts. When a change of circumstance is to absolve from liability, provision to that effect should be inserted in the bargain. If I pronounced in favour of the defendants I should be giving a decision of a legislative rather than judicial character, and I might well be rendering superfluous in many cases the provisions contained in the Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25).

I may mention that in the present case I am satisfied that the plaintiffs were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that the timber merchants in this country did not hold stocks of Finnish larch.

I decide against the first contention of the defendants.

I now consider the second point raised before me. The defendants submitted that the case was covered by the Courts (Emergency Powers) Act, 1917, and that I should annul the contract upon suitable terms by virtue of s. 1, sub-s. 1, of that Act. The sub-section enables application to be made to the Court by any party to "a contract for the construction of any building or work or for the supply of any materials for any building or work entered into before August 4, 1914." In my opinion the sub-section has no application to the present case. The keynote of the words I have read is "construction." The sub-section only applies to the cases (*a*) of an ordinary building contract; (*b*) a contract for the construction of some work which in substance resembles a building contract, as, for instance, the laying of a water system, the making of a bridge or the like; and (*c*) to the supply of materials for a contract which falls within either (*a*) or (*b*). The wording of the sub-section is narrow. Its operation is restricted. In my view it cannot apply to a contract for the supply of timber to be used for the making of bobbins for spinning mills. Sub-s. 2 of s. 1 of

(1) [1916] 2 A. C. 397.

the Act and s. 3 of the Act apply to contracts generally. But sub-s. 1 of s. 1 deals with a particular and limited body of contracts, and with respect to such contracts only can the Court give relief if the circumstances exist which are indicated in the sub-section. The second point raised by the defendants therefore fails also.

I must now deal with the question of damages, and here I must state a few further facts. On August 6, 1914, the plaintiffs wrote to the defendants the following letter: "Sirs,—How are you situated with reference to the birch squares on order for us? We want a truck of $1\frac{1}{8}$ inch and $1\frac{1}{16}$ inch mixed very badly." Thereupon the defendants replied as follows on August 7: "Dear Sirs,—We have your favour of yesterday and regret we have no prospect at present of being able to supply your requirements owing to the war. If our fleet is able to clear the seas, both the Baltic and the North Sea, of the German warships we may hope to see steamers again running to Finland, and in that case we may be able to supply you." I accept the evidence of Mr. Dawson, the plaintiffs' managing director, that upon receipt of that letter he assumed that the defendants would supply when they could. I also accept his evidence that the plaintiffs were willing to extend the defendants' time for the delivery of the timber. Hence he did not reply to the letter of August 7, 1914. In November, 1914, a few letters passed between the parties with respect to a possible supply to the plaintiffs of some Finland birch by one of the defendants' customers. But nothing came of the suggestion. From November, 1914 to 1916, the plaintiffs were waiting. Then they heard that Finnish timber was being imported into this country. Apparently arrangements had been made for shipment to Sweden, thence by rail to Norway or across Sweden, and thence again by shipment from a Scandinavian port to England. Hence they wrote to the defendants on July 31, 1916, and explained that they had been patiently waiting for delivery and that they needed a supply. Thereupon the defendants wrote on August 1, 1916, that all pre-war contracts were cancelled by the war. The defendants, however, offered to supply a certain shipment at 26*l.* per standard, and they made a similar offer by letter of August 3, 1916. The plaintiffs claim as damages the difference between 10*l.* 15*s.*, the contract price, and the sum of 26*l.* per standard, which clearly represents the price in August,

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1916. The defendants sold all their imports of the Finnish larch in 1918 at that figure. The defendants argued, however, that the damages should be assessed as in November, 1914. But the plaintiffs submitted that the correspondence between the parties, and particularly the letter of August 7, 1914, amounted to a request by the defendants for an extension of time for delivery, and that this request was assented to by the plaintiffs. If this be so, then the principle of *Ogle* v. *Earl Vane* (1) applies. Upon consideration I am of opinion that the plaintiffs are right in their submission. Upon the facts and documents in this case I think that the proper business conclusion to draw is that the defendants requested the plaintiffs to extend the time for delivery. I have considered the judgments in *Ogle* v. *Earl Vane* (1), and in my view they cover the present case.

I therefore hold that the plaintiffs are entitled to recover as damages the difference between 10*l.* 15*s.* and 26*l.* per standard. Even if I had taken November, 1914, as the date of assessment, as suggested by the defendants, I should, in spite of the ingenious arguments of Mr. Jowitt, have arrived at the same sum as damages, for in the absence of Finland birch the plaintiffs were entitled to do the best they could under the principle of *Hinde* v. *Liddell.* (2) They bought English timber, which is far less pliable than Finnish birch, and which involves far more expense and also far more waste in cutting.

After a careful consideration of the whole of the complex and detailed evidence upon the point and the arguments of counsel thereon, I have come to the conclusion that the plaintiffs' damages would not be less if assessed in November, 1914, than if assessed in August or September, 1916.

I therefore give jugdment for the plaintiffs for 1067*l.* 10*s.* with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Gibson & Weldon, for H. Worden, Blackpool.*

Solicitors for defendants: *Trinder, Capron & Co.*

(1) (1868) L. R. 3 Q. B. 272. (2) (1875) L. R. 10 Q. B. 265.

F. O. R.

[IN THE COURT OF APPEAL.]

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Dec. 12, 13, 14, 18, 19.

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[1915 T. 1653.]

Practice—Parties—Causes of Action—Joinder of Defendants—Separate Causes of Action—Conspiracy to slander—Separate Claims for individual Slanders—Order XVI., rr. 1, 4; *Order XVIII., rr.* 1, 8—*Slander on Plaintiff in his "Office"—Officers of Trade Union—Judgment for Declaration without alleging Damage.*

The plaintiffs were eight members of a trade union called the National Union of Railwaymen. One was the president of the union, another was the general secretary, three were assistant secretaries, and three were members of the executive committee. The general secretary and the assistant secretaries received salaries from the union, and the other four received no salary, but were paid a fixed sum per day for expenses when engaged on the work of the union. The defendants were six members of a trade union called the Associated Society of Locomotive Engineers and Firemen. In June, 1915, at a meeting at which representatives of the railway companies and the plaintiffs and defendants as representatives of their respective unions were present, a request was made for a war bonus of 5*s.* a week to railwaymen, but this request was not granted. At a meeting in October, 1915, a war bonus of 5*s.* a week was granted to the men. In October, 1915, the defendants made speeches at meetings of railwaymen in various places reflecting on the conduct of the plaintiffs at the meeting in June, and stating that but for their conduct at that meeting the men would have got the bonus then. The plaintiffs brought an action in respect of those statements. The statement of claim alleged that the defendants conspired together to injure the plaintiffs by publishing defamatory matter, and that in pursuance thereof they spoke and published of the plaintiffs and each of them in respect of their offices as officials of the union certain defamatory statements, and they claimed damages against the defendants. No special damage was alleged or proved. The jury found that four of the defendants had conspired to slander the plaintiffs; that all the defendants slandered the plaintiffs; and they assessed the damages for the separate slanders published by each of the defendants, but did not assess any damages on the conspiracy claim. Judgment was entered for the plaintiffs for the respective amounts awarded to them by the jury, and for a declaration that the four defendants had conspired to injure the plaintiffs by publishing oral defamatory statements of them:—

Held—(1.) that the causes of action for conspiracy and for the separate slanders by each of the defendants were not improperly

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joined in one action, subject to the power of the judge to order separate trials of the different causes of action if in his opinion it would be embarrassing to try them all in one action; (2.) that each of the plaintiffs held an office of profit or of honour, and that, as the slander imputed to each misconduct in his office, the action was maintainable without proof of special damage; and (3.) that, as damage was the gist of the cause of action for conspiracy, the declaration was wrongly made.

APPLICATION for judgment or new trial in an action tried before Darling J. and a jury.

The action was brought by eight plaintiffs against six defendants. The plaintiffs were members of the National Union of Railwaymen (herein called the "union"), a trade union for all classes of railway servants. The following were the names of the plaintiffs and their respective positions in the union:—Thomas, Lowth, and Hudson were assistant secretaries; Williams was the general secretary; Bellamy was the president; and Cramp, Charles, and Cuthbertson were members of the executive committee, who with the other plaintiffs were appointed members of a sub-committee of the executive committee to take part in negotiations with the railway companies' representatives in connection with the request for a war bonus or increase of wages for railway servants. Thomas, Lowth, Hudson, and Williams were salaried members of the union as hereinafter mentioned, and the other four plaintiffs did not receive any salary, but each was paid 12*s.* 6*d.* a day for expenses when engaged on the work of the union, and in addition they received their railway fares.

The defendants were members of the Associated Society of Locomotive Engineers and Firemen, a trade union for drivers, firemen, and others connected with locomotives. The defendant Moore was the assistant secretary of the society, Wilson was a clerk in the general offices of the society and was formerly the secretary of a branch, Cooke and Gamble were members of the executive committee, Drummond was an organizing secretary, and Bromley was the general secretary of the society.

The objects of the National Union of Railwaymen were, according to its rules (inter alia), to improve the conditions and protect the interests of its members; to obtain and maintain reasonable hours of duty, rates of wages, and other conditions of labour; and to

provide certain benefits to members. By rule II., for the supreme government of the union there was an annual general meeting consisting of sixty representatives elected by the members and the president and general secretary. By rule III., sub-rule 1, for the general administration of the union's business and for its government in the intervals between any two annual general meetings there was an executive committee consisting of the president, general secretary, and twenty-four representatives elected by the members. By sub-rule 2, the president was elected at each annual meeting; and by sub-rule 3, the executive committee were elected for three years, one-third retiring each year, and for the purpose of election the union was divided into six districts; but should two-thirds of the branches in any district be dissatisfied with their representative they had the power to demand a poll of the members of that district at the expiration of each year, and the candidate receiving the largest number of votes was to hold office for the ensuing three years. By sub-rule 4, the meetings of the executive committee were held quarterly at the head office of the union, and the president or general secretary might summon a special meeting. By sub-rule 5, the executive committee administered the business and affairs of the union and governed the union subject to the annual general meeting; and by sub-rule 6, every decision and order of the executive committee was binding on members and branches, subject to appeal to the next succeeding annual general meeting. By rule IV., the general secretary was elected by the members, and remained in office during the will and pleasure of a majority of the members, who had, through the annual or special general meeting, power to dismiss him or call on him to resign. His duties were (inter alia) to obey the orders and be under the control of the executive committee. He received a salary of 225*l.* a year, and, subject to the approval of the annual general meeting, rising by 12*l.* 10*s.* a year to the maximum of 300*l.*; and when it was necessary for him to attend at any place on the union's business he was paid his expenses. By rule V., there were four assistant secretaries, the first assistant secretaries being Thomas, Hudson, Lowth, and Chorlton, who received a salary of 225*l.* a year; the subsequent assistant secretaries were elected in the same manner as the general secretary, and each received a salary of 175*l.* a year, rising by yearly increments of

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10*l.* to a maximum of 225*l.* Each had charge of a special department, and they were to act under the directions of the executive committee and general secretary.

It appeared that in February, 1915, a meeting was held between representatives of the railway companies and representatives of the union and of the society with reference to an increase in the wages of railwaymen, and at that meeting a war bonus of 3*s.* a week was granted to men rated below 30*s.* a week and of 2*s.* a week to men rated at or over 30*s.* a week. The agreement provided that the same should be subject to review at the end of three months. In June, 1915, at a meeting between the representatives of the same bodies the question of a war bonus to lads under eighteen years of age came up for consideration, and a request was also made for a war bonus of at least 5*s.* a week for men. The railway companies' representatives offered 1*s.* 6*d.* for lads under eighteen, but no further bonus was granted to the men at that meeting. The railway companies were approached later with the view of obtaining an increase of the war bonus, and meetings were held in October, 1915, between representatives of the above-named bodies, and on October 13 an agreement was arrived at for a war bonus of 5*s.* a week to adults over eighteen and of 2*s.* 6*d.* a week to lads under eighteen.

The defendants at meetings held in October, 1915, as hereinafter mentioned, made statements reflecting on the conduct of the plaintiffs, and especially of the plaintiff Thomas, at the meeting held in June, 1915, and said that but for their conduct at that meeting the railwaymen would have got the bonus of 5*s.* in June instead of in October. The plaintiffs brought this action in respect of those statements. The statement of claim alleged that between October 10 and 16, 1915, the defendants conspired together to injure the plaintiffs and each of them by publishing and/or causing to be published of the plaintiffs and each of them false and defamatory statements, both oral and in writing, throughout the United Kingdom; and that in pursuance of the conspiracy the defendants falsely and maliciously spoke and published of the plaintiffs and each of them in respect of their office as officials of the National Union of Railwaymen and as representatives of the said union the following false and malicious defamatory statements. The statement of claim then

set out extracts from speeches delivered by the defendant Moore at meetings at Bradford and Leeds on October 17, 1915, and at Ardsley on October 24; by the defendant Wilson on October 17 at Bradford and on October 31 at Sowerby Bridge; by the defendant Cooke on October 17 at Crewe and Northampton; by the defendant Drummond on October 17 at Edinburgh and on October 24 at Airdrie; by the defendant Gamble on October 17 at Birmingham and on October 31 at Nottingham; and by the defendant Bromley on October 17 at Manchester and Liverpool; and also a letter written by the defendant Moore to and published in the *Locomotive Journal*. The innuendo (shortly stated) was that the statements complained of meant, and were understood to mean, that all the plaintiffs, and particularly the plaintiff Thomas, were guilty of dishonest conduct as officials of the union and/or delegates or representatives of the members of the union and/or as representatives of railwaymen at the meeting in June, 1915, and in connection with the negotiations for a war bonus. Paragraph 15 of the statement of claim alleged that by reason of the premises the plaintiffs had been injured in their credit and reputation and in their said offices and positions and had incurred public odium and contempt. The plaintiffs claimed: (1.) "Damages against the defendants and each of them for slander and libel in pursuance of the said conspiracy against the plaintiffs. (2.) Further or alternatively damages against the defendants and each of them for slander. (3.) Further or alternatively damages against the defendants and each of them for libel." (4.) An injunction. No special damage was alleged or proved.

The defendants in their defence denied the conspiracy, denied the innuendo, pleaded justification and fair comment, and that the occasions on which the statements were made were privileged, the meetings at which the statements were made being meetings of railwaymen and members of the society and being called to consider and discuss matters of common interest and concern to all railwaymen and to the public at large, namely, the assistance to be granted to railwaymen by the railway companies to enable the men to meet the increased cost of living owing to the war.

At the close of the plaintiffs' case counsel for the defendants submitted (so far as material) that the statement of claim rested the action solely on conspiracy, that there was no evidence of

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conspiracy, and that therefore the action failed; that there were no claims for damages for separate slanders and for libel against the several defendants, and that if the statement of claim had disclosed such claims they would have been struck out on application at chambers on the ground that six separate actions could not be tried in one; that the alleged slanders were not actionable without proof of special damage; and that the occasions were privileged, and there was no evidence of actual malice. Darling J. held that three causes of action were alleged—conspiracy, slander, and libel; that there was evidence of conspiracy; and that the action was maintainable without proof of special damage. He reserved the question of privileged occasion until after verdict.

The questions left to the jury, with their answers, were as follows: (1.) Did the defendants or any of them, and if so which of them, conspire together to slander or to libel the plaintiffs or any of them; if so, which of them?—The defendants Moore, Cooke, Gamble, and Bromley did conspire to slander or to libel all the plaintiffs. (2.) Did the defendants or any, and if so which, of them slander the plaintiffs or any, and if so, which of them?—All the defendants did slander all the plaintiffs. (3.) If so, what are the damages for slander, if any?—Damages for slander against the defendants—Moore, 150*l.*; Wilson, 25*l.*; Cooke, 50*l.*; Gamble, 50*l.*; Drummond, 50*l.*; Bromley, 150*l.* (total 475*l.*), to be divided as follows (among the plaintiffs):—Thomas, 150*l.*; Bellamy, 150*l.*; Williams, 50*l.*; Lowth, Hudson, Cramp, Charles, and Cuthbertson, 25*l.* each. (4.) Did Moore publish a libel on the plaintiffs or any of them?—Moore did publish a libel on Thomas, Williams, Lowth, and Bellamy. (5.) If so, did he do so in pursuance of the aforesaid conspiracy?—No. (6.) Damages for libel, if any?—50*l.* (7.) Were the various statements complained of as slanderous true or fair comment?—Not true nor fair comment. (8.) Were they made with malice?—Yes. (9.) Are the statements complained of as libellous true, or fair comment?—Not true nor fair comment. (10.) Were they published with malice?—Yes.

The learned judge ordered judgment to be entered for the plaintiffs against the defendants respectively for the amounts awarded by the jury; for a declaration that the defendants Moore, Cooke, Gamble, and Bromley unlawfully and maliciously conspired to injure the

plaintiffs by publishing oral defamatory statements of them; and that judgment be entered for the defendants Wilson and Drummond on the claim for conspiracy.

The defendants appealed.

Compston, K.C., and *R. A. Shepherd*, for the defendants. [After contending that the statement of claim disclosed only a cause of action for conspiracy, whereas the jury had given damages for the separate slanders.] Assuming that the statement of claim alleges a cause of action for conspiracy and separate causes of action for the slanders by the individual defendants, the causes of action cannot be joined in one action: *Sadler* v. *Great Western Ry. Co.* (1) Order XVI., r. 4, under which that case was decided, is not affected by the alteration made in October, 1896, in r. 1 after the decision in *Smurthwaite* v. *Hannay*. (2) The plaintiffs cannot under Order XVI., r. 4, and Order XVIII., r. 1, join these causes of action; and the defendants may, under Order XVIII., r. 8, "at any time" apply for an order confining the trial to one or other of the causes of action. As Lord Russell of Killowen said in *Smurthwaite* v. *Hannay* (3), speaking of the joinder of plaintiffs, it is "more than an irregularity; it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure." Lord Herschell also laid down the same proposition. (4) An application was made to the learned judge at the trial at the close of the plaintiffs' case to separate the causes of action, but he refused to make any order. The defendants could not have applied at chambers before the defence was delivered, because the statement of claim, in their view, only alleged a cause of action for conspiracy. The proper course was to wait until the trial and then if the plaintiffs endeavoured to claim damages for the separate torts to take the objection. In *Gower* v. *Couldridge* (5) it was held that, where several defendants are sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all: see also *Thompson* v. *London County Council* (6); *Pope* v. *Hawtrey*. (7)

(1) [1896] A. C. 450.
(2) [1894] A. C. 494.
(3) Ibid. 506.
(4) Ibid. 501.
(5) [1898] 1 Q. B. 348.
(6) [1899] 1 Q. B. 840.
(7) (1901) 85 L. T. 263.

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The principle of those decisions applies to the present case. If this was a joint tort the jury had no power to sever the damages: *Greenlands, Ld.* v. *Wilmshurst* (1); *Dawson* v. *M'Clelland.* (2) The effect of the alteration in r. 1 of Order XVI. on joinder of defendants is discussed in the Annual Practice, 1918, p. 224. Order XVIII. has not been altered, and r. 1 only authorizes a "plaintiff" to unite in the same action several causes of action. The verdict and judgment therefore cannot stand. [*O'Connell* v. *Reg.* (3), *Hickson* v. *Lombard* (4), *Ferguson* v. *Botterell* (5), and Order XX., r. 7, were also referred to.]

Next, the action is not maintainable without proof of special damage. None of the plaintiffs held any "office" so as to make the words actionable without proof of special damage. The word "office" has never been applied to such positions as the plaintiffs hold in their trade union. They do not hold an "office of honour or credit," nor does the payment to some of the plaintiffs of 12*s.* 6*d.* a day for their expenses when they are engaged on the union's business make them holders of an "office of profit." Even if they hold an office, the words were not spoken of them in relation to that office. The words did not impute want of integrity or incapacity in that office. [They also contended that there was no evidence of conspiracy; that the occasions were privileged and there was no evidence of actual malice; and that the learned judge had not sufficiently directed the jury.]

Rawlinson, K.C., and *Sir Hugh Fraser* (*Edmond Browne* with them), for the plaintiffs. The statement of claim alleges a claim for conspiracy and claims for separate slanders against the separate defendants. Since the alteration in 1896 of r. 1 of Order XVI. that order applies to causes of action as well as to parties: *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (6); *Oesterreichische Export A.-G.* v. *British Indemnity Insurance Co.* (7); *Times Cold Storage Co.* v. *Lowther* (8); *Ferguson* v. *Botterell.* (5) The plaintiffs were therefore entitled to unite these causes of action

(1) [1913] 3 K. B. 507; [1916] 2 A. C. 15, 31, 32, 40.
(2) [1899] 2 I. R. 486.
(3) (1844) 11 Cl. & F. 155, 245.
(4) (1866) L. R. 1 H. L. 324.
(5) Not reported. See note of case in Fraser on Libel, 5th ed., p. 85.
(6) [1910] 2 K. B. 354, 365.
(7) [1914] 2 K. B. 747.
(8) [1911] 2 K. B. 100, 107.

against the different defendants in one action, subject to any order which the Court in its discretion might make as to separate trials. The words complained of as slanderous were attacks upon the plaintiffs as officers of the National Union of Railwaymen, and all arose out of the same subject-matter, namely, the negotiations with the railway companies for an increase of wages. If so, the Court will not interfere with the discretion of the judge; and, further, at the most it was an irregularity only, and it is too late to take the objection at the trial: *Lloyd* v. *Great Western Dairies Co.* (1) The point ought to have been taken in the defence, or by summons at chambers: see Order LXX., rr. 1, 2; Annual Practice, 1918, pp. 1315, 1317, 1318. Moreover, the defendants did not ask the judge at the trial to order separate trials of the different issues. The only submission to the judge was that the statement of claim only alleged a claim for a joint tort, namely, conspiracy.

Next, there was ample evidence of conspiracy. It is admitted that the second and third findings of the jury were not findings as to conspiracy and damages consequent thereon; still, though damage is the gist of the action for conspiracy—*Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2)—the plaintiffs were entitled to waive the damages and to ask for a declaration only, being content to have the damages assessed on the claims for the separate slanders. The jury were properly directed that they could not find a verdict for the plaintiffs on the conspiracy claim unless there was damage. The declaration therefore was rightly made. [*White* v. *Mellin* (3) was also referred to.]

Next, the slanders were uttered of the plaintiffs in relation to their conduct in their respective offices in the union, and therefore proof of special damage was not necessary. Bellamy was president of the union, and he and the three members of the executive committee appointed on the sub-committee were paid 12*s.* 6*d.* for expenses when engaged on the business of the union, of which they could keep any balance after payment of expenses; and the other four plaintiffs received salaries from the union. They all held offices of profit. Even if any of them did not hold offices of profit they held offices of honour. An office of trust, though it is not an office of profit, is

(1) [1907] 2 K. B. 727.
(2) (1888) 21 Q. B. D. 544, 549; (1889) 23 Q. B. D. 598, 616.
(3) [1895] A. C. 154.

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enough: *Booth* v. *Arnold.* (1) *Alexander* v. *Jenkins* (2) was a case of unfitness for, and not of misconduct in, an office. There is no distinction in this respect between a public office and any other office. [They also contended that there was no misdirection; that the occasions were not privileged, and that even if they were there was evidence of actual malice.]

Compston, K.C., in reply. Improper joinder of plaintiffs, as was said in *Smurthwaite* v. *Hannay* (3), is not a mere irregularity, and the judge at the trial should himself take objection to the different causes of action being tried together. It is a matter of right in the defendants to have the actions tried separately. The observations of Vaughan Williams L.J. in *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (4) are in the defendants' favour. [He also cited *Jones* v. *Jones* (5) on the question whether the action was maintainable without proof of special damage.]

PICKFORD L.J., after stating that in the course of the trial the case had given rise to a good many complications and difficulties, and he had had considerable doubts whether it would not be necessary to send the case for a new trial, but he had come to the conclusion that it was possible to avoid such a course; and after describing the respective positions of the plaintiffs and defendants, and the circumstances out of which the action arose, continued: The slanders alleged were that the plaintiffs did not act bona fide in the interests of those they represented, but really acted in the interests of the railway companies and of the capitalist class, and did not, to use a colloquial expression, run straight. If the words would fairly bear such a meaning, undoubtedly the jury might say that they were defamatory. At the close of the plaintiffs' case the point was taken by the defendants that the statement of claim disclosed only a joint cause of action, namely, for conspiracy to slander (I put the libel aside, as nothing turns upon it), followed by the overt acts of slandering, and did not allege separate causes of action against the different defendants. The learned judge held that it alleged both joint and separate causes of action. I am not myself inclined

(1) [1895] 1 Q. B. 571.
(2) [1892] 1 Q. B. 797.
(3) [1894] A. C. 501, 506.
(4) [1910] 2 K. B. 362.
(5) [1916] 2 A. C. 481.

to agree with that view of the learned judge, though a very little addition would have been sufficient to introduce an allegation of separate causes of action, but that addition might have left the statement of claim open to attack by summons in chambers to strike it out on the ground that it would be embarrassing to try the different causes of action together. It is said that the result of the learned judge's ruling is to construe the statement of claim as containing causes of action which could not be joined in one action and tried together, and that the defendants were entitled as of right to have them struck out. In my opinion that is not correct. Whatever the law may have been at the time when *Smurthwaite* v. *Hannay* (1) was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right. That was decided by this Court in *Oesterreichische Export A.-G.* v. *British Indemnity Insurance Co.* (2) and *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (3), which are binding upon us. The effect of those decisions is, in my opinion, correctly stated in Fraser on Libel, 5th ed., pp. 82-89. Therefore the point taken by the defendants that these causes of action cannot, as a matter of law, be joined in one action fails. It was, however, within the learned judge's discretion to say that they should not be tried together if he thought it wrong that they should. He was not asked in terms, after he had ruled that the statement of claim disclosed joint and separate causes of action, to say that they ought not to be tried together, but during the argument as to the meaning of the statement of claim the principles upon which the Court acts in such cases were sufficiently brought to the notice of the learned judge to enable him to exercise his discretion, if he had thought fit to do so, by refusing to allow the different causes of action to be tried together. He did not do so. The result is that the learned judge thought that the causes of action could without injury to any one be tried together in the action then before him, and he had better opportunity of judging of that than a judge in chambers has, because he had heard the whole of the plaintiffs' case at the time when he was asked to rule as to the

(1) [1894] A. C. 494. (2) [1914] 2 K. B. 747.
(3) [1910] 2 K. B. 354.

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construction of the statement of claim. Looking at what happened, we must take it that the learned judge was of opinion that these causes of action could be tried together; that they were sufficiently alleged in the statement of claim; and that, if it had been necessary, he would have made the small amendment required to make it clear upon the face of the statement of claim, and the trial would have proceeded as it did. Therefore I do not think any substantial injustice was occasioned by that wrong construction, if it were a wrong construction, of the statement of claim. But I think that what happened afterwards is a good illustration of the difficulties which arise when several causes of action are tried together. [The Lord Justice, having referred to the inconvenience and difficulty of trying in one action an action for conspiracy and what were really eight separate actions for slander, said that the words complained of were capable of the defamatory meaning alleged; that the occasions on which the words were spoken were not privileged, the speakers and those who came to hear the speeches—he would assume that they were all railwaymen—not having in the particular circumstances of this case a common interest so as to create a duty in the speakers in the protection of the common interest of themselves and the attendants at the meeting to discuss the matters, and that made it unnecessary to consider the question of malice, though, if it had been necessary to consider it, he doubted whether the verdict could have stood, as he did not think that the summing-up sufficiently distinguished between the different defendants.]

I now come to the question of conspiracy. There was a joint claim for conspiracy to slander and there were separate claims for slander. If the plaintiffs obtained a verdict upon the conspiracy claim it would be a joint verdict, and there would have to be joint damages against all the defendants, and the damages could not have been distributed between them: *Greenlands, Ld.* v. *Wilmshurst.* (1) That would have prevented separate verdicts being obtained. On the other hand, if the plaintiffs had obtained separate verdicts against the defendants, they could not get a joint verdict for the same slander with damages again. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2) Bowen L.J. said: "It may be observed in passing that

(1) [1913] 3 K. B. 507; [1916] 2 A. C. 15.
(2) 23 Q. B. D. 616.

as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy." The jury found that four of the defendants conspired to slander or to libel all the plaintiffs. There was in fact only one libel, and the jury found that it was not published in pursuance of the conspiracy. Then came the question whether the defendants or any of them slandered the plaintiffs, and the answer was that all the defendants slandered all the plaintiffs. Upon the question of damages the jury awarded separate damages against each defendant, ranging from 150*l.* against Moore and Bromley to 25*l.* against Wilson. We were frankly told by counsel for the plaintiffs that they did not intend to rely upon the answers to questions 2 and 3 as being findings that the slanders were uttered in pursuance of the conspiracy. The questions were not put with that intention, and they could not have been, because there cannot be separate damages and joint damages for the same slander. Therefore there was, if I may use the expression, a finding in the air in answer to question 1 that the defendants conspired. The difficulty was apparent. As matters stood no judgment could be drawn up on the finding as to conspiracy. An application was therefore made to the learned judge to make a declaration that the four defendants conspired. That was wrong. There was no claim for a declaration. The only claim was for damages for conspiracy. It is true that in the statement of claim an injunction was claimed, but no case was made for an injunction, and an injunction was not asked for at the trial. No declaration was asked for until after verdict. The declaration as to conspiracy cannot stand with the judgment for the separate sums against the several defendants, because it would be most embarrassing. Counsel for the plaintiffs said that he had a right to maintain the judgment for a declaration as he had only waived the damages with regard to the conspiracy. If what Bowen L.J. called the gist of the action is waived, it seems to me that the cause of action is abandoned. But I will not put it that the plaintiffs abandoned their cause of action. It may be convenient to have a claim for a declaration as to the rights of the parties in respect of contracts extending over a long space of time, and not to wait until there is a breach to have the rights determined. But I have never heard of a declaration that a defendant is doing wrong, unless perhaps it is followed by a

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statement that damage has accrued or is likely to accrue, and that the defendant threatens to continue his wrongful act against the plaintiff. The claim was for damages for conspiracy, and no damage was proved. The two judgments cannot stand together, and judgment must be entered for all the defendants on the claim or conspiracy.

There remains one point. No special damage was found. The question therefore arises whether the plaintiffs are entitled to maintain the action without proof of special damage. That depends upon whether the plaintiffs hold offices of profit or of honour. If they do, undoubtedly the words were spoken of them in relation to their conduct in such offices. There can be no doubt that Thomas, Williams, Lowth, and Hudson hold offices of profit, and as regards Bellamy, though it may be doubtful to what, if any, extent he profits in money, I think that his position as president of such a society as the National Union of Railwaymen is an office which entitles him to sue for slander without proof of special damage. With regard to the other three defendants, I have great doubt, and I am not sure that if I were sitting alone I should say that they were holding such an office as would entitle them to sue. They are members of a sub-committee of the executive committee of the National Union of Railwaymen; they are not paid, but they receive an allowance of 12*s.* 6*d.* a day on each occasion when they have to attend on the union's business, and they get free railway fares. There may be some profit left out of the 12*s.* 6*d.* which is given them for expenses, but it must be very small, and I should be inclined myself to say that they do not hold either an office of honour or an office of profit within the meaning of the authorities. However, it is a matter in which the other members of the Court hold an opposite opinion, and I do not hold a sufficiently strong opinion to dissent. Therefore I think that all the plaintiffs are entitled to recover.

The result is that the defendants will have judgment on the claim for conspiracy, and the rest of the judgment will stand.

BANKES L.J., [after stating that, in his opinion, Darling J. took the right view of the statement of claim; that the statement of claim was embarrassing because it did not make it perfectly plain on its face what the plaintiffs' claim was, and also because it joined

together causes of action by eight plaintiffs against six defendants, which could not conveniently be tried together, and that if a summons had been taken out at an early stage of the proceedings to strike out the statement of claim as embarrassing it would have succeeded, continued :] It is said that the statement of claim, in joining the various causes of action, was bad so as to entitle the defendants at any stage of the action to claim as a matter of right that the action should not be allowed to proceed in its existing form. I do not agree with that contention. So far as the claim was for a conspiracy the defendants were rightly joined, and, that being so, in my opinion the effect of the alteration of r. 1 of Order XVI., coupled with Order XVIII., is that the plaintiffs were entitled to join with the cause of action for conspiracy the separate causes of action against the individual defendants, subject to the right of the Court to interfere on application if in its opinion such a course was embarrassing. We were pressed with the decision in *Sadler* v. *Great Western Ry. Co.* (1) The difficulty which may arise when a similar case to that is sought to be brought under the rules is pointed out in the note to Order XVI., r. 4, in the Annual Practice, 1918, p. 224. It is not, however, necessary to discuss that question, because this case is not like *Sadler* v. *Great Western Ry. Co.* (1) In the present case the defendants are rightly joined so far as regards the cause of action for conspiracy, and the only question, therefore, under the rules is whether the other individual causes of action can be properly joined without embarrassing the defendants. At the trial, at the close of the plaintiffs' case, counsel for the defendants submitted that the statement of claim did not disclose any cause of action against the defendants individually, but only disclosed a joint cause of action for conspiracy. The learned judge ruled against that objection. It was then open to the learned counsel to ask that the various causes of action should be tried separately, because it was competent for the learned judge, even at that stage, to direct that the action for conspiracy should be tried first and that the other separate causes of action against the defendants individually should be tried afterwards. No such application was made.

I now pass on to consider the difficulties in which both parties were placed owing to the statement of claim containing claims both

(1) [1896] A. C. 450.

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for conspiracy and for the separate slanders. The plaintiffs were in this difficulty, that they could not succeed on both causes of action, because they had only suffered damage in respect of the slanders; and they could not, as it seems to me, make the same damage support the cause of action for conspiracy and also the causes of action for the separate slanders. The defendants were in this difficulty, that, if they desired each defendant's case to be considered separately, it was almost impossible to put the jury in a position in which they would be able to do that if they had to deal with all the cases at once. I will indicate what as regards each of the six defendants the issues were. First, what did the particular defendant say, and was it defamatory of one or more of the plaintiffs? Secondly, was the occasion privileged? Thirdly, if Yes, was the particular defendant malicious? Fourthly, of whom did he speak the alleged slander; was it of all the plaintiffs or of one or more and which of them? Fifthly, was the plaintiff, or were the plaintiffs, of whom the words were spoken the holder or holders of an office of honour or profit? Sixthly, if Yes, did the words spoken touch him or them in that office? Seventhly, what damages must each defendant pay to the particular plaintiff slandered? Considering that there were eight plaintiffs and six defendants, a mere statement of what it was necessary to establish in each case is sufficient to indicate the practical impossibility of any summing-up enabling the jury to deal satisfactorily with each defendant's case. But the defendants throughout treated the action as a fight between the two unions, and I am satisfied that that is how they desired it to be dealt with, and that they did not desire that each individual's case should be dealt with separately. If they had so desired, I do not think I should have been able to arrive at the conclusion at which I have arrived. Darling J. so treated it. The defendants were content that their cases should be treated in bulk and not dealt with separately. Therefore the summing-up did not say much about the individual cases of the defendants, and in the circumstances the non-direction, having regard to the way in which the issues were fought, caused no substantial wrong or miscarriage of justice, and this is a case in which under Order XXXIX., r. 6, we need not order a new trial.

With regard to the claim for conspiracy, the plaintiffs have failed

to recover any damages on that cause of action, and therefore have failed in the gist of the action. That being so, the judgment for the fanciful declaration must be set aside, and judgment must be entered for the defendants on this claim.

[The Lord Justice then said that the words complained of were capable of a defamatory meaning; and that the evidence was wholly insufficient to establish that the occasions were privileged.]

The remaining question is whether or not with regard to any or all of the plaintiffs the words complained of are actionable without proof of special damage. I admit that this case goes beyond any of the decided cases, but as conditions change and new positions are created—positions of importance in various organizations—the principle of the law will be extended to meet those particular cases. In my opinion, having regard to their duties, the members of the executive committee of this union are just as much officials as the man who for the time being is president or secretary. They acted as executive officers and as such they received certain payments when they were engaged on the union's business. In these circumstances I think that they occupied an office of profit, which does not, as I understand, mean an office that is actually and necessarily profitable, but an office in which, in respect of the work the person does in that office, he receives payment.

On these grounds I agree in the conclusion arrived at by Pickford L.J.

NEVILLE J. I arrivs at the same conclusion. I think that if I had been the judge at the trial, and had had to construe the statement of claim, I should have construed it as alleging a claim for a joint tort only, and not as intended to include separate claims against the several defendants. But it seems to me that it was within the competence of the learned judge to direct the trial of the causes of action together in the manner in which they were tried. It is clear that the defendants endeavoured to limit the scope of the trial to a joint claim against all the defendants, but, having failed in that, I doubt whether any of them desired to have their cases segregated and not to have the whole of the claims made against them disposed of in one action. No miscarriage of justice has taken place.

One word about the declaratory decree. Speaking as a judge of

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the Chancery Division, a Division which may claim as the descendant of the old Court of Chancery to have an inherited instinct with regard to declaratory decrees, I wish to say that, in my opinion, the granting of relief by way of declaration in the present case involved a misconception of the circumstances in which declaratory decrees have ever been, or are in the present day, made. I agree that the judgment with regard to that was wrong.

With regard to the question of privilege, it appears to me that on the evidence no privileged occasion was established.

With regard to the question whether some of the plaintiffs can recover without proof of special damage, it seems to me that, apart from the question whether they hold a paid office, the members of the executive committee of the union hold an office of credit, and a defamatory statement with regard to their conduct when acting as a sub-committee appointed by the executive committee out of their own body is a reflection upon their conduct as members of the executive committee, and is consequently actionable without proof of actual damage. In the course of the development of society offices of credit are created, which were unknown to society perhaps only half a century before; they may grow in importance, while those of older days become of less importance, and I think it would be wrong to limit offices of credit to those which in past times have presented in the Courts examples of such offices.

Judgment varied.

Solicitors for plaintiffs: *Pattinson & Brewer.*

Solicitors for defendants: *Swepstone, Stone, Barber & Ellis, for Ford & Warren, Leeds.*

W. F. B.

In re THE PLYMOUTH BREWERIES, LIMITED (*In re* THE "PRINCE ARTHUR" PUBLIC-HOUSE, PLYMOUTH). 1918 *Feb.* 11.

Licensing Acts—Compensation—Award by Inland Revenue Commissioners—Appeal—Extension of Time—Delivery of Statement of Grounds of Appeal—Practice and Procedure—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 10—*Licensing* (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 20—*Rules of the Supreme Court* (*Finance Act*), 1895, *r.* 1—*Rules of the Supreme Court, Order* LXIV., *r.* 7; *Order* LXVIII., *rr.* 1, 2.

Where the Commissioners of Inland Revenue have determined under s. 20 of the Licensing (Consolidation) Act, 1910, the amount of compensation to be paid in respect of the non-renewal of an old on-licence, the delivery to the Commissioners by a person aggrieved by the decision, and who desires to appeal therefrom to the High Court, of a written statement of the grounds of his appeal, as required by r. 1 of the Rules of the Supreme Court (Finance Act), 1895, is a matter of procedure or practice within the meaning of Order LXVIII., r. 1, of the Rules of the Supreme Court. When, therefore, the statement is not delivered within the prescribed period of one month the Court has power under Order LXIV., r. 7, to enlarge the time for its delivery.

The delivery to the Commissioners of a written statement of the grounds of appeal is the first step in an appeal to the High Court against the decision of the Commissioners, and is not a condition precedent to the aggrieved person's right of appeal.

APPLICATION by the Plymouth Breweries, Limited, for leave to appeal from the decision of the Commissioners of Inland Revenue determining the amount of compensation to be paid in respect of the non-renewal of the licence of the "Prince Arthur" public-house, Plymouth.

The facts and arguments sufficiently appear from the judgment.

Wootten, for the applicants.

C. F. Lowenthal, for the Inland Revenue Commissioners.

SANKEY J. This application raises a small point under the Licensing (Consolidation) Act, 1910. The facts are comparatively simple, and are not in dispute. On October 19, 1917, an award was made by the Commissioners of Inland Revenue in respect of the compensation to be paid for the non-renewal of the licence of

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the "Prince Arthur" public-house at Plymouth, and it was received on the same date by the manager of the Plymouth Breweries, Limited, the owners of the premises. He was not aware that any time was fixed within which an appeal against the award must be brought and his solicitor was ill at the time. He consulted his solicitor as soon as the solicitor was able to see him, namely, on November 27, when the time for appealing had expired, and the solicitor then took his instructions. The solicitor on December 7 wrote to his London agents, who immediately telephoned to the Commissioners of Inland Revenue stating that the time for appealing had expired, but that they were about to apply to the Court for an extension of time. On December 10 the London agents wrote to Plymouth for further instructions and did not receive them until December 21. On January 22, 1918, the London agents formally notified the Commissioners of Inland Revenue that they intended to apply to this Court to extend the time for appealing.

Two objections have been taken against an extension of time being granted. The first objection taken is that in my discretion I ought to refuse to extend the time. I think, however, having regard to the illness of the solicitor and to the steps which were taken, that this is not a case where I ought to exercise my discretion against the applicants. I think they had an excuse, under the circumstances, for not being in time, and if I have power to extend the time I shall certainly do so.

The second objection is a more formidable one, namely, that there is no jurisdiction to extend the time. That raises a question as to the construction of one or two sections of Acts of Parliament. The right of appeal is given under s. 20, sub-s. 2, of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), which says: "The amount to be so paid shall, if an amount is agreed upon by the persons appearing to the compensation authority to be interested in the licensed premises and is approved by that authority, be that amount, and, in default of such agreement and approval, shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal, under section ten of the Finance Act, 1894, to the High Court, as on the valuation of an estate for the purpose of estate duty, ..." Sect. 10, sub-s. 1, of the Finance Act, 1894, is in the following terms: "Any

person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners or such portion of it as is then payable by him, appeal to the High Court within the time and in the manner and on the conditions directed by rules of Court." Therefore the appeal is to be to the High Court within the time and in the manner and on the conditions directed by rules of Court. Rules of Court have been made under s. 10 of the Finance Act, 1894, of which the first is as follows: "Any aggrieved person within the meaning of section 10, sub-section (1.) of the Finance Act, 1894, who desires to appeal to the High Court in any of the cases mentioned in the said sub-section shall, within one month from the date of the notification to him or his solicitor of the decision or claim of the Commissioners, deliver to them a written statement of the grounds of such appeal." In the present case the award or decision having been made on October 19, the month referred to in r. 1 would expire on November 19.

Order LXVIII., r. 1, of the Rules of the Supreme Court provides as follows: "Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters:— . . . . (*c*) Proceedings on the Revenue side of the King's Bench Division." Now this is a proceeding on that side. Rule 2 of Order LXVIII. provides: "The following orders shall, as far as they are applicable, apply to all proceedings on the Revenue side of the said Division, namely, ... (*f*) Order LXIV. (Time)." Therefore Order LXIV. as to time applies, and by r. 7 of that order it is provided as follows: "A Court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

I was referred to *In re Oliver and Scott's Arbitration* (1), but that

(1) (1889) 43 Ch. D. 310.

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case does not appear to me to be an authority in point. What I have to determine is whether this is a matter of practice or procedure—that is to say, whether I have power to enlarge the time for doing any act or taking any proceeding.

Mr. Lowenthal, on behalf of the Inland Revenue Commissioners, contends that the written statement of the grounds of appeal, which under r. 1 of the Rules of the Supreme Court (Finance Act), 1895, has to be sent to the Commissioners within a month from the decision, has nothing to do with the practice and procedure of the Court; that the delivery of the written statement of the grounds of appeal is a condition precedent to the right to appeal, and is not something done in any proceeding in the Court; that the Court only gets seisin of the appeal after the statement has been delivered; and that it is only when the Court gets seisin of the appeal that any step becomes a matter of practice or procedure upon which Order LXIV., r. 7, is entitled to operate. If that argument is correct I have no power to extend the time, because the matter is not before the Court. But I do not think the argument is correct. It appears to me that the delivery of the written statement of the grounds of appeal is not a matter outside the jurisdiction of this Court in the sense contended for by Mr. Lowenthal. In my opinion the delivery of the written statement is the first step of procedure in the appeal in this Court. The words of the rule are "Any aggrieved person within the meaning of section 10, sub-section (1.) of the Finance Act, 1894, who desires to appeal to the High Court . . . . shall . . . . deliver . . . . a written statement of the grounds of such appeal." Therefore I start with the assumption that the statement is delivered by a person who desires to appeal. Without for a moment going so far as to say that a person who desires to appeal is an appellant, one gets rather near to that condition when one sees that the document which he has to deliver to the Commissioners of Inland Revenue is not a notice of appeal to them. They are not the people who have to decide the appeal. The rule says that a person who desires to appeal to the High Court shall deliver to the Commissioners a written statement of the grounds of the appeal. In my view that means that the person who desires to appeal must serve upon the people who may be the other party to the appeal a written

statement of the grounds of his appeal. It seems to me that although up to the moment of serving the written statement the person serving it may be only a person who desires to appeal as distinguished from an appellant, yet as soon as he has served the written statement of the grounds of his appeal he becomes an appellant to this Court. The procedure then becomes rather curious, because an opportunity—I will not call it a locus poenitentiae—for revision of their decision is given to the Commissioners, and they may, if they like, alter their determination. Rule 3 of the Rules under the Finance Act, 1894, s. 10, goes on to say: "At any time thereafter not exceeding one month from the date of the notification by the Commissioners of their determination to maintain their decision or claim either in whole or in part, the appellant may proceed with his appeal by way of petition to the High Court . . . ." It is clear that the person delivering the written statement is there called an appellant. When did he become an appellant? Nothing that the Commissioners did altered his position. His position is defined by what he himself did. Therefore it seems to me that as soon as he delivered the written statement of the grounds of his appeal it was in the nature of an appeal to this Court. He then became an appellant to this Court, subject to its being within the power of the Commissioners to make a counter-offer to dispose of the matter without troubling this Court. Therefore I think that the written statement, instead of being a condition precedent to an appeal, is the foundation of the proceedings and the first step of the proceedings in this Court.

Under those circumstances I am of opinion that the question whether the time for appealing shall be extended is a matter of practice and procedure, and I think that the appellants are entitled to have the time extended, but as this is an indulgence to the appellants they must pay the costs of this application.

Time for appealing against award extended.

Solicitors for applicants: *Godden, Holme & Ward, for Thomas H. Gill, Devonport.*

Solicitor for Inland Revenue Commissioners: *Solicitor of Inland Revenue.*

R. F. S.

C. A. [IN THE COURT OF APPEAL.]

1918
Feb. 11, 19, 20.

THE KING *v.* SUPERINTENDENT OF CHISWICK POLICE STATION.

Ex parte SACKSTEDER.

Alien—Deportation—Order for Arrest and Detention—Duty to consider each individual Case—Power of Court to go behind Order—Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1—*Aliens Restriction* (*Consolidation*) *Order*, 1916, *art.* 12.

The Home Secretary made an order under the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916, that a certain alien, who was a French subject of military age, should be deported from the United Kingdom and should remain out of the United Kingdom during the continuance of the war. The order was made in consequence of an arrangement between the French and British Governments by which French subjects resident in this country who are liable to military obligations in France are sent to France. At the same time the Home Secretary gave directions that the order should be enforced immediately. The Home Secretary had previously given general directions that any person named in a deportation order which was intended to be enforced immediately should be arrested and conveyed by ship from the United Kingdom and should be detained between the time of his arrest and the sailing of the ship selected for his passage. Acting under those general directions an assistant secretary in the Home Office caused instructions to be given to the police for the alien's arrest and conveyance to the ship selected for his deportation. The alien was accordingly arrested. On an application for a writ of habeas corpus :—

Held, that the order for arrest was a valid order, and that the applicant was in legal custody.

Semble, an order for the arrest and detention of an alien against whom a deportation order has been made must be made by the Secretary of State himself in each individual case ; but *held* that in this particular case this had been done.

Semble, by Pickford and Warrington L.JJ., the Court can go behind an order for arrest, which is valid on its face, as, for instance, if it is a mere sham not made bona fide.

Appeal from an order of the Divisional Court (Earl of Reading C.J., Darling and Low JJ.) discharging a rule nisi for a writ of habeas corpus. The rule was obtained on behalf of Leon Georges

Sacksteder, a French subject, and was addressed to the superintendent of the Chiswick Police Station.

On June 22, 1917, the Secretary of State for the Home Department made an order for the deportation of the applicant in these terms: "In pursuance of the powers conferred by the Aliens Restriction Act, 1914 (1), and article 12 of the Aliens Restriction (Consolidation) Order, 1916 (2), I hereby order that Leon Georges Sacksteder, an alien, shall be deported from the United Kingdom, and shall

(1) 4 & 5 Geo. 5, c. 12, s. 1, sub-s. 1: "His Majesty may at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the Order . . . . (*b*) for prohibiting aliens from embarking in the United Kingdom, either generally or at certain places, and for imposing restrictions and conditions on aliens embarking or about to embark in the United Kingdom; and (*c*) for the deportation of aliens from the United Kingdom; . . . . (*h*) for imposing penalties on persons who aid or abet any contravention of the Order, and for imposing such obligations and restrictions on masters of ships or any other persons specified in the Order as appear necessary or expedient for giving full effect to the Order; and (*i*) for conferring upon such persons as may be specified in the Order such powers with respect to arrest, detention, search of premises or persons, and otherwise, as may be specified in the Order, and for any other ancillary matters for which it appears expedient to provide with a view to giving full effect to the Order; and (*k*) for any other matters which appear necessary or expedient with a view to the safety of the realm."

Sub-s. 2: "If any person acts in contravention of, or fails to comply with, any provisions of any such Order, he shall be liable on conviction . . . . to a fine not exceeding one hundred pounds or to imprisonment with or without hard labour for a term not exceeding six months . . . ."

(2) The Aliens Restriction (Consolidation) Order, 1916, art. 12, clause 1: "A Secretary of State may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter, or so long as the order remains in force, remain out of the United Kingdom."

Clause 2: "Where an alien is ordered to be deported under this Order, he may, until he can, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained in such manner as the Secretary of State directs, and, whilst so detained, shall be deemed to be in legal custody."

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remain out of the United Kingdom during the continuance of the war."

The facts were stated in two affidavits made by John Pedder, C.B., assistant secretary in the Home Office, in opposition to the rule, the first of which was as follows :—

" 1. There has for some time been in operation an arrangement between the French and British Governments by which the conduct of the war has been facilitated by the return to France of French subjects resident in this country who are liable to military obligations in France. This arrangement has been carried into effect through the machinery of deportation orders made by the Home Secretary in suitable cases against French subjects who refuse to return of their own accord.

" 2. On the 17th March, 1917, the Home Office received from the French Minister of War information that the above-named applicant Leon Georges Sacksteder (who is a Frenchman within military age whether reckoned according to the French or the British standard) was an absentee (insoumis) from the French Army. The French Government requested that he should be compelled to leave the United Kingdom and be placed at the disposal of the French authorities.

" 3. On the 3rd April, 1917, the applicant, at the request of the police, called upon the French Consulate and promised to attend there on the 11th April to receive his passport and proceed to France to join the French Army.

" 4. He omitted to attend at the French Consulate on the 11th April, but on that date his solicitor wrote to the Home Office requesting that he might be made a naturalised British subject, and then become liable to serve in the British instead of the French Army.

" 5. This request was not granted, but he was told that he might enlist as an alien in the British Army and that if he failed to do so within seven days of the 19th May the Secretary of State would have to reconsider the case.

" 6. The applicant failed to comply with the said permission and on the 22nd June, 1917, the Home Secretary, in pursuance of his powers under the Aliens Restriction Act, 1914, and article 12 of the Aliens Restriction (Consolidation) Order, 1916, ordered that the

applicant should be deported from and should remain out of the United Kingdom during the continuance of the war. At the same time directions were given to the police to enforce the order forthwith by having the applicant arrested and conveyed to Southampton, and there placed on board a ship leaving the United Kingdom for France."

The Divisional Court held that they were bound by the decision of the Court of Appeal in *Ex parte Duke of Chateau Thierry* (1), and discharged the rule. The applicant appealed.

During the course of the arguments in the Court of Appeal the Court said that they would like a further affidavit on this point: Assuming, without deciding it, that the deportation order by itself was not sufficient authority to detain the applicant in custody, then, if that were so, there required, in order to justify a detention in custody, a direction of the Secretary of State, and they wished to know whether any such direction was given, and if so, how it was given, and whether it was a general direction to the officials of the Home Office to act in all cases, or whether there was a special direction given in this particular case. The case was accordingly adjourned for a further affidavit to be made. The following further affidavit was accordingly made by Mr. Pedder:—

"1. I crave leave to refer to paragraph 6 of my previous affidavit sworn in this matter on the 3rd day of July, 1917, and to say that the Secretary of State directed that the order referred to in the said paragraph should be enforced immediately.

"2. Acting under the general directions of the Secretary of State that any person named in a deportation order which is intended to be enforced immediately shall be arrested and conveyed by ship from the United Kingdom and shall be detained between the time of his arrest and the sailing of the ship selected for his passage, I caused the necessary instructions to be given to the police in the case of Sacksteder for his arrest and conveyance to the ship selected for his deportation.

"3. In pursuance of such instructions he was arrested on the 29th day of June, 1917, at 7.20 P.M. at the Stamford Brook Railway Station, and was taken to Chiswick Police Station, from where he was to have been taken to Southampton. On the following day

(1) [1917] 1 K. B. 922.

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(30th June), however, the application to the High Court on behalf of Sacksteder for a rule nisi was granted against the superintendent of the Chiswick Police Station, and was made returnable on the 4th day of July, 1917. The proceedings under the deportation order were thereupon stayed and Sacksteder was detained until such time as a bond could be obtained by way of security in the sum of 300*l.* for Sacksteder's surrender in the event of the rule being discharged. The said bond was provided on the 4th day of July, 1917, and Sacksteder was thereupon released and has been at liberty ever since."

Hawkin, for the appellant. The question in this case is whether the appellant is in legal custody. In *Ex parte Duke of Chateau Thierry* (1) the applicant was not arrested, and so this question did not arise. By s. 1, sub-s. 2, of the Aliens Restriction Act, 1914, an alien who fails to comply with the order is liable on conviction to a fine or imprisonment. That is the remedy provided by the Acts, and it is the only remedy. The Order in Council giving an alternative remedy by arrest and detention is ultra vires. Moreover, there is nothing in the order of the Home Secretary directing the appellant to be arrested. There is only an order that the appellant shall be deported from the United Kingdom and shall remain out of the United Kingdom during the war. "No man can be taken, arrested, attached, or imprisoned but by due process of law, and according to the law of the land": Co. Inst., Part 2, 52, commenting on cap. 29 of Magna Charta. A distinction is drawn in s. 1 of the Act between the deportation (sub-s. 1 (*c*)) and the expulsion (sub-s. 6) of aliens. "Expulsion" implies using force and begins where the person to be expelled is found. "Deportation" does not necessarily imply the use of force, and it means leaving the country. Further, the Home Secretary by his order intends to do an illegal act, namely, to hand the appellant over to the French military authorities. There was no evidence of that fact in the *Duke of Chateau Thierry's Case.* (1) The dictum of Swinfen Eady L.J. in that case (2) ought not to be followed. The Court on an application for a writ of habeas corpus has power to go behind the order for arrest and see if "what was really in contemplation was the exercise

(1) [1917] 1 K. B. 922. (2) [1917] 1 K. B. 930.

of an abuse of power" : per Low J. in *Rex* v. *Governor of Brixton Prison.* (1) [*Reg.* v. *Wilson* (2) and clauses 10 and 11 of the "Convention to regulate the Commercial and Maritime Relations between Great Britain and France," dated February 28, 1882, set out in Hertslet's Treaties and Conventions, vol. 15, p. 184, were also referred to.]

Sir F. E. Smith, A.-G., and *Branson*, for the respondent. The last point, namely, that the Court can go behind the order, was raised and decided against the contention of the appellant in *Ex parte Duke of Chateau Thierry.* (3) As to the duty of the Secretary of State under the Aliens Restriction Act, 1914, and the Order of 1916, it would be impossible in all cases for the Home Secretary to consider each individual case before making an order for arrest. Suppose there are 100 destitute foreigners, the subjects of a particular country, whom it is desirable to deport, the Home Secretary need not consider the case of each individual separately. It is sufficient if he considers the class and exercises his discretion as to the class, and he can then make a general order as to that class. In this case, according to the affidavits, the Home Secretary considered the case of the appellant and ordered him to be deported and that the order should be enforced immediately, and having done that his general instructions that the person so named for deportation should be arrested and taken to the selected ship applied. The question has now become an academic one because the arrangement with France has come to an end, and the appellant will now have to serve in the British Army under the provisions of the Military Service (Conventions with Allied States) Act, 1917 (7 & 8 Geo. 5, c. 26).

Hawkin in reply.

PICKFORD L.J. This is an appeal from the decision of the Divisional Court, that decision proceeding upon a previous decision of this Court in the case of *Ex parte Duke of Chateau Thierry.* (3) That case, although it covered some of the points in this case, did not decide the point before us. It may be that we expressed our opinion on points which may lead eventually to the decision in

(1) [1916] 2 K. B. 742, 752. (2) (1877) 3 Q. B. D. 42.
(3) [1917] 1 K. B. 922, 930.

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this case, but the actual decision was that the deportation order in that case was a good order, that the Secretary of State had a discretion on which we could not sit on appeal as to deporting an alien under the power of the Aliens Restriction Act, 1914, and the Aliens Restriction (Consolidation) Order, 1916. That was the decision, but we did express opinions, whether wisely or not, upon two other points. We expressed an opinion that that Act and that Order did not give the Government or the Secretary of State power to make an order deporting to a particular destination, and that if an order were made to deport to any particular country or any particular destination, that order could not be supported under the legislation and the Order in Council. We also expressed another opinion that under art. 12, clause 2, an alien whom the Secretary of State ordered to be detained until he could be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, and whilst being conveyed to the ship and whilst on board the ship, could be placed on a ship that was selected by the Secretary of State. I do not think that clause 2 of art. 12 can be read without seeing that, although it does not say that the Secretary of State may select the ship upon which the alien is to be placed, it must be left to him to choose the ship. It would be almost impossible to work a regulation which provided that the Secretary of State should convey a man to a ship and place him on board of it, and at the same time gave that man the choice of the particular ship. The result would be to enable him to refuse to go upon any ship except one that he himself chose, which might defer the matter for an indefinite time. What was left undecided—and it is the only question really in this case—is whether there is a valid order under which the appellant can be detained in custody. That depends upon whether the requirements of the Order have been satisfied. It seems to me that one has to scrutinize the matter carefully for this reason. This legislation had not in view a case of this kind when it was passed. It had in view simply the deportation from this country of aliens whom the Secretary of State thought it was not right to allow to remain here ; it had not in view the purpose of carrying out an agreement between this country and an allied country, by which this country agreed to place subjects of that allied country of military age within its jurisdiction. There

was an agreement made with the Republic of France to that effect, that we should return to them persons subject to military service and that they should return to us British subjects subject to military service. Such an arrangement seems a very proper one, but such a procedure was not contemplated by this Act, and this Act does not give, as we decided in *Ex parte Duke of Chateau Thierry* (1), power to do that, but it did give a power which we thought enabled the Secretary of State indirectly to attain the object. It is not for me to say whether it is better in cases of this kind to obtain direct authority to do what the Government want to do, or to take advantage of indirect means if those indirect means enable the same object to be attained. That is for the Government to consider. It is perhaps not unsatisfactory to be told that the matter really does not arise now because in consequence of other arrangements between this country and France cases of this kind will not arise again.

What happened in the case was this. A deportation order was made which according to our previous decision was a perfectly good order. Upon that the deportee was arrested (he is now on bail), and he was to have been kept in custody until he was placed on board a ship which was going to France. The justification for that was that the Home Secretary, in pursuance of his powers under the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916, ordered that the appellant should be deported from and should remain out of the United Kingdom during the continuance of the war. At the same time directions were given to the police to enforce the order forthwith by having the appellant arrested and conveyed to Southampton, and there placed on board a ship leaving the United Kingdom for France. The regulation under which this was done is as follows: [The Lord Justice read art. 12, clause 2, of the Order of 1916.] It seemed to us that it did not sufficiently appear how the direction to enforce the order was given, because I am not satisfied that it would be competent for the Secretary of State to give a general order for detention. It is not a question of the liberty of a British subject; it is a question of the liberty of a person living under the protection of our laws; and when power is given to a dignified high officer to

(1) [1917] 1 K. B. 922.

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restrict that person's liberty, I am inclined to think—it is not necessary to decide it—that it must be done by that high officer himself; that he cannot make a general order without considering the circumstances of each case, but that he must examine and see whether the particular person ought to be detained in custody. In consequence we asked that a further affidavit should be made by Mr. Pedder, and he has made one. He says this: [The Lord Justice read clauses 1 and 2 of Mr. Pedder's second affidavit.] That seems to me to show an examination of this case and a determination by the Secretary of State himself. The general order that is given is that anybody against whom an order is made that the deportation shall be enforced immediately is to be kept in custody and detained until that can be carried out. The Secretary of State, according to the affidavit, examined into this particular case and gave a direction that the deportation order should be immediately enforced. As soon as he had done that it seems to me that there was a determination by him that this case should come within the general direction that had been previously given by him. It is not necessary if he examines into the particular case and gives a direction which he knows involves a certain consequence that he should set out that consequence in that direction. It is not for me again to consider whether it would not have been better that in the Order of 1916 there should have been some provision as to the form in which the order should be made. There is none. It seems to me any direction, whether oral or written, if it be made by the Secretary of State, is sufficient to satisfy the Order. There is that direction in this case. In my opinion it is not possible for us to go behind that. I wish to guard myself in this way. I am not prepared to go quite so far as I think Low J. was inclined to go in the case of *Rex* v. *Governor of Brixton Prison*. (1) I am not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that and see what the motives for making that order were. But I certainly am not inclined to say that in no case can the Court go behind an order which on the face of it is valid ordering detention or custody. If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or bona fide order, it

(1) [1916] 2 K. B. 752.

seems to me the Court can go behind it. Therefore I wish to guard myself against being supposed to say there are no circumstances in which the Court can go behind an order for detention valid on the face of it. In this case I do not think there are any grounds for doing so. I do not think the fact of the motive being to carry out the agreement between France and this country is sufficient to show that this order to detain the appellant until he can be placed on board a ship, even though that ship may be going to France, is enough to entitle us to say it is an invalid order and that the custody was not a legal custody. For these reasons I think this appeal must be dismissed.

Pickford L.J.

WARRINGTON L.J. I am of the same opinion. This is an appeal from an order of the Divisional Court discharging a rule nisi for the issue of a writ of habeas corpus to bring up the body of one Leon Georges Sacksteder. Sacksteder is a French subject, and on June 22, 1917, under the powers of the Aliens Restriction Act, 1914, and art. 12 of the Aliens Restriction (Consolidation) Order, 1916, the Secretary of State for the Home Department made an order that Leon Georges Sacksteder, an alien, should be deported from the United Kingdom and should remain out of the United Kingdom during the continuance of the war. Directions were given for the arrest and detention of Sacksteder, and he was accordingly arrested and detained under those directions. The directions were given under clause 2 of art. 12 of the Aliens Restriction (Consolidation) Order, 1916. It is in evidence that the deportation order and the subsequent directions were given in pursuance of an arrangement between the French and British Governments for the return to France of French subjects resident in this country who are liable to military obligations in France. It is also in evidence that the directions for his arrest involved the placing of Sacksteder on board a ship leaving the United Kingdom for France. The question we have to determine is whether in the words of the Order in Council the appellant was in legal custody.

First, with regard to the construction of the Act and the Order. It has been determined by the Court of Appeal in the *Duke of Chateau Thierry's Case* (1) that the power to make a deportation

(1) [1917] 1 K. B. 922.

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order does not confer the power to order the alien to be deported to any particular country. The members of this Court who decided that case also expressed the opinion that the Order in Council did confer upon the Secretary of State the power to select the particular ship upon which the man is to be placed. The decision in the *Duke of Chateau Thierry's Case* (1) was only that the deportation order was a valid order. What we have to decide is whether the man was in lawful custody, which is a different question. The power to select the particular ship indirectly undoubtedly involves a power on the part of the Secretary of State to send the man to a particular country selected by the Secretary of State. Whether it is desirable that such a power should be indirectly given when the statute and Order in Council do not give that power directly may be a serious question, but it does not arise in this case.

The question that arises, and which was not determined in the *Duke of Chateau Thierry's Case* (1), is whether the Secretary of State has given a proper and valid direction pursuant to clause 2 of art. 12 of the Order in Council. That clause is in these terms: [The Lord Justice read the clause.] Whether, therefore, he is in legal custody depends upon whether the Secretary of State has given a direction to that effect. The evidence with regard to that is this: The Secretary of State himself directed that the order of June 22, 1917, should be enforced immediately. He had previously given general directions that any person named in a deportation order which is intended to be enforced immediately should be arrested and conveyed by ship from the United Kingdom and should be detained between the time of his arrest and the sailing of the ship selected for the passage, and it was under those general directions that the appellant was arrested. I will assume that the direction referred to in clause 2 of art. 12 is the direction by the Secretary of State himself as to the particular man in question, but on that assumption I am clearly of opinion that such direction was in fact given in the present case. The direction that the order be enforced immediately was given in reference to the case of a specific person. The Secretary of State gave that direction knowing it would involve the application of the general directions which had been previously given in reference to such cases. It seems to me, therefore, that

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there was in this case a direction of the Secretary of State with reference to this particular man that he should be arrested or detained. We have therefore, I think, all the circumstances here which place this man in legal custody.

Then can the Court in this case go behind the order, which is a legal order, for arrest? I am far from saying that there may not be cases in which that can be done. If, for example, the order, though on the face of it a valid order, was a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. In the first case I am far from saying that the Court could not go behind the apparently valid order and say that it was no order at all. In the second case I am far from saying that the Court might not find means of preventing the subsequent illegal act from being done. But in the present case there is nothing of that sort. The order is on the face of it valid, and there is no pretence for saying that it is a sham order or anything of the kind, nor is there any pretence for saying that under it or in consequence of it something illegal is going to be done by any of the officers of the Executive Government. As soon as a ship leaves these shores the functions of the Executive Government come to an end. What happens after that is no concern of theirs, and I think it is not for us to consider what may be the ultimate motive with which the Secretary of State may make the order. The intention with which he makes the order is the intention that the man shall be placed on board a ship going to France. It may be that the motive actuating that intention was that the man shall be landed in France. In my judgment in the present case, at all events, we cannot go behind the order made; that order is a valid order, and for these reasons the appeal must be dismissed.

SCRUTTON L.J. I approach the consideration of this case with the anxious care which His Majesty's judges have always given, and I hope will always give, to questions where it is alleged that the liberty of the subject according to the law of England has been interfered with, and none the less when the person is not by birth or naturalization a subject of the King but a foreigner temporarily living within the King's protection. This jurisdiction of His Majesty's judges was of old the only refuge of the subject against

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the unlawful acts of the Sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the Executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of His Majesty's judges to protect those people.

One has to bear in mind that in times of war and national emergency most liberties of the subjects have been much restricted by the Legislature. Responsibility for the exercise of the powers conferred by Parliament on the Executive must rest with the Executive and not with the Court. It is true that in this case there is not much room for sympathy, or, as the Attorney-General has said, this discussion may even be academic. The appellant is a French subject who desires to avoid helping France in the time of France's national emergency. It is difficult to feel much sympathy with such an appellant; and inasmuch as he is not desirous of being sent to France, and there is no intention of sending him to France, and he is under notice to be called up for service in the English Army, I agree with the Attorney-General that the question is somewhat academic, and I should not have said much on the matter, but that it raises a question that may affect numerous other applications. The appellant complains that he was arrested in order that he may be sent to France. He says the Executive Government have no power to send him to France. An Act of Parliament in 1914 empowered His Majesty by Order in Council to make provision for the deportation of aliens from the United Kingdom, for prohibiting aliens from embarking in the United Kingdom except at certain places, for imposing restrictions on aliens embarking in the United Kingdom, and for conferring upon such persons as may be specified in the Order such powers with regard to arrest, detention, and otherwise as may be specified in the Order, with a view to giving full effect to the Order. Under this statutory power an Order in Council has been made which allows the Secretary of State to order the deportation of any alien. When an alien is ordered to be deported he may, until he can be conveyed to and placed on board ship, and whilst being conveyed to the ship, and whilst on board the ship until the ship finally leaves the United Kingdom, be detained. That being the statutory authority and the Order in Council made under it, the construction of those provisions came

before the Court of Appeal in *Ex parte Duke of Chateau Thierry*. (1) I understand all the members of the Court to have said that this Court is not a Court of Appeal from the discretion of the Secretary of State in making an order of deportation. I understand all the members of the Court to have said that art. 12 of the Order in Council gives the Secretary of State a power to select the ship on which the alien shall be deported, so that, while they all say the Secretary of State cannot in terms make an order that an alien shall be deported to a specific country, yet he has power to select the ship on which the alien may be placed, with the probable result that, unless the alien manages to get overboard on to some other ship, he will go to the country to which the ship on which he is placed is sailing. That has been decided for me by the Court of Appeal, and I am bound by it.

The only question, therefore, in this case is whether this particular alien has been treated in any illegal way. An order for deportation has been made against him, and it is in the form held valid by the Court of Appeal in the *Duke of Chateau Thierry's Case*. (1) The further question is whether the arrest under that order was justified. It is not necessary in my view finally to decide it in this case, but I notice that Parliament has allowed the Order in Council to confer upon such persons as may be specified in the Order powers with regard to arrest and detention. In my view at present those powers are of a judicial character and cannot be delegated by the person named in the Order, and if the Secretary of State had purported to make a general regulation that all aliens without consideration of their particular character should be arrested, I should have had very serious doubt whether such an act of the Secretary of State was within the power conferred on him. We have required a further affidavit as to the manner in which the power has been exercised in this case, and it appears from the statement of Mr. Pedder, the assistant secretary to the Home Office, that the Secretary of State having made the deportation order against Sacksteder has directed that that order should be immediately enforced. To understand what is meant by enforcing it immediately Mr. Pedder further states a further direction of the Secretary of State; that is, the person named in the deportation order shall be arrested and conveyed by ship from the United Kingdom. In my view that is the individual

(1) [1917] 1 K. B. 922.

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act of the Secretary of State, as required by the Act and the Order in Council. It is true that the result may be that unless the alien can escape from the ship he will go to a particular place. It appears to me that that follows inevitably, when once it is admitted, as I am bound to admit in view of the judgment of the Court of Appeal, that the Secretary of State has the power to select the ship on which the alien shall be placed.

For these reasons I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Whitgreave, Mack & Co.*
Solicitor for respondent: *Treasury Solicitor.*

W. F. B.

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[IN THE COURT OF APPEAL.]

REIGATE *v.* UNION MANUFACTURING COMPANY (RAMSBOTTOM), LIMITED AND ELTON COP DYEING COMPANY, LIMITED.

[1917 R. 177.]

Contract—Agent—Contract by Company to employ for fixed Time—Consideration given by Agent—Voluntary Liquidation—Determination of Agency.

By an agreement dated December 27, 1915, and made between the plaintiff and a limited company, which carried on business in Lancashire, in consideration of the plaintiff subscribing for 1000*l.* in shares of the company and of introducing to the company certain new classes of goods to be manufactured by them, the company appointed him their sole agent in the United Kingdom, India, and the Colonies for the sale of those goods for the term of seven years (if the agent should so long live) and thereafter until the agreement should be determined by six months' notice on either side. The agent was to use his best endeavours to obtain orders for the company's said goods at prices to be from time to time agreed upon, and all orders obtained by the agent were at once to be communicated to the company, who upon approving or rejecting the same were to inform the agent thereof and who were to carry out such orders as were accepted without undue delay; and the agent was not definitely to accept orders for the company, but only subject to confirmation and acceptance by the company

such confirmation or acceptance not to be unreasonably withheld. The company were to pay the agent a commission upon the invoiced prices of all goods delivered by the company and duly paid for by the respective purchasers. A few months afterwards the company required fresh capital, and they applied to the plaintiff to assist them in finding it, telling him that otherwise they would have to close down. The plaintiff tried to do so, but failed. The company then asked the plaintiff to give up the agency for the Manchester district, telling him that he would have to "stand down" so far as that district was concerned, in which case they thought that they could find the necessary capital, but he refused. The company thereupon, being insolvent, passed resolutions for voluntary winding up and ceased to do business through the plaintiff, and eventually sold their business. In an action to recover damages for breach of the agreement to employ the plaintiff as their agent for the seven years :—

Held, that the agreement was to employ the plaintiff as agent for the seven years, and a term could not be implied to the effect that the company could terminate the agency at any time by ceasing to carry on their business ; and that the circumstances, coupled with the voluntary winding up, showed a repudiation by the company of the agreement, and they were therefore liable in damages for the breach.

Midland Counties District Bank v. *Attwood* [1905] 1 Ch. 357 considered.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury.

The plaintiff was a manufacturer's agent carrying on business in London. The first defendants, the Union Manufacturing Company (Ramsbottom), Limited, carried on business in Lancashire. The plaintiff, who had done a large business before the war broke out in August, 1914, in connection with the sale of certain classes of goods manufactured in Germany, came to an arrangement with the first defendants that they were to install certain plant for manufacturing the goods, and the plaintiff was to subscribe for 1000 shares of 1*l*. each in the Union Company and was to be appointed their sole agent for the sale of those goods in certain countries. Accordingly on December 27, 1915, an agreement under seal was entered into between the Union Manufacturing Company (Ramsbottom), Limited, and the plaintiff which (after certain recitals not necessary to set out) was as follows :—

" 1. In consideration of the said Albert Maurice Reigate applying for one thousand one pound shares in the capital of the company

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and paying the same up in full on allotment and also in consideration of the agent having introduced and suggested introducing certain lines of goods to the company, the company hereby appoints the said Albert Maurice Reigate, and the agent hereby accepts the position of, sole agent for Great Britain and Ireland, India and the Colonies (save and except for the sale of molletons for the city of Manchester) for the sale of cotton and union rugs, cotton and union shawls, cotton and union blankets, cotton sheets, table covers, curtains and molletons, either made up or in piece, for the term of seven years from the date hereof (if the agent shall so long live) and thereafter until these presents shall be determined by either party giving to the other six calendar months' notice in writing of such intended determination."

" 2. The agent shall use his best endeavours to obtain orders for the company's said goods at prices to be from time to time agreed upon between the parties hereto and all orders obtained by the agent shall be at once communicated to the company who upon approving or rejecting the same shall inform the agent that the same have been either accepted or rejected as the case may be, and shall carry out such orders as are accepted without any undue delay and in accordance with the terms thereof."

" 3. The company shall pay or allow to the agent so long as he shall continue to be their agent under these presents a commission of four per cent. upon the invoiced price of all goods delivered by the company under the terms of these presents and duly paid for by the respective purchasers thereof. The agent hereby undertakes and agrees to indemnify the company up to an amount of fifty per cent. upon all bad debts incurred in reference to goods sold by the agent under the terms of this agreement."

Clauses 4 and 5 related to the keeping by the company of the agency accounts, which were to be made up quarterly in each year, and the commission shown to be due thereon was to be paid.

" 6. The agent shall during the continuance of his agreement give such portion of his time and services to the obtaining of orders for and on behalf of the company as aforesaid as may be necessary for the purpose, and shall be at liberty to carry on his usual trade and business as manufacturers' agent, &c., as hitherto."

" 7. The company hereby agrees during the continuance of this

agreement not to appoint any other agent for the sale of the goods the subject-matter of these presents, and will not directly accept orders from any other person but will refer such other persons to the agent for the orders to be carried out and executed through him."

"8. The agent shall not during the continuance of this agreement act as agent for any other firm for goods made by the company and the subject-matter of this agreement so far as such goods shall be manufactured by the company."

"10. The agent shall not definitely accept orders for and on behalf of the company, but shall only accept such orders subject to confirmation and acceptance by the company, but such confirmation or acceptance shall not be unreasonably withheld."

The second defendants, the Elton Cop Dyeing Company, Limited, by an agreement of December 28, 1915, guaranteed to the plaintiff the due performance of the above agreement between the plaintiff and the first defendants.

The plaintiff subscribed for 1000*l.* in the capital of the Union Company, and acted as sole agent for the company for the sale of the above-mentioned goods. In the year 1916 the company required more capital, otherwise, as they told the plaintiff, they would have to close down, and they applied to him to assist them in finding it; and he made certain efforts to do so, but failed. A correspondence ensued between the company and the plaintiff in which the company proposed to endeavour to find the money in Manchester, which, in their view, could only be done if the plaintiff gave up the agency for the Manchester district—in other words, he was to "stand down" so far as that district was concerned. The plaintiff refused to accede to this suggestion, and the result was that the company was unable to continue its business. On December 27, 1916, a resolution was passed for voluntarily winding up the company, and the confirming resolution was passed on January 17, 1917. The plaintiff treated the voluntary winding up of the company as a repudiation of the agreement with him, and on January 22, 1917, he issued the writ in this action claiming damages for breach of the agreement. The statement of claim alleged that from and after the voluntary winding up the company ceased to employ the plaintiff as their sole agent and thereby treated the agreement

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and agency as terminated. After the winding up the company ceased to do business through the plaintiff, and a few months afterwards they sold their business without making provision for the plaintiff's agreement being taken over by the purchaser.

Bailhache J. held upon the construction of the agreement that the Union Manufacturing Company were not at liberty to stop their business and thereby put an end to the plaintiff's agency. The learned judge said that in order to obtain the agency the plaintiff paid 1000*l.* for shares in the company, and had to introduce certain lines of goods; in other words, he bought his agency agreement, and that was a very important point to take into consideration in seeing whether the agreement fell within the class of which *Rhodes* v. *Forwood* (1) was an example, or within the class of which *Turner* v. *Goldsmith* (2) was an example. In cases like *Rhodes* v. *Forwood* (1) there was no consideration moving from the agent to the employer which was executed. He thought it difficult to apply the principle of that case to a case where the agent bought the agency. Further, the agent was to use his best endeavours to obtain orders, and the company were bound to accept and execute those orders unless they had some reasonable excuse for refusing to do so. In *Rhodes* v. *Forwood* (1) there was no obligation on the part of the employer to accept orders from the agent at all. The second question was whether the voluntary liquidation was a determination of the agency agreement. Whether it did so or not must depend upon the reason and object of the liquidation. The reason was that the company were unable to get the capital necessary to enable them to carry on their business, and they became in fact insolvent. Insolvency coupled with the voluntary liquidation constituted a breach of the agreement. But if he was wrong in supposing that the reason of the liquidation was insolvency, the object of the liquidation, as was apparent from what happened subsequently to the winding up, was to sell the business and the assets. In either case the voluntary liquidation put an end to the agreement and amounted to a breach thereof. The plaintiff was therefore entitled to damages. The inquiry as to damages would be taken by the official referee. The plaintiff was not entitled to have his orders executed at a loss to the company, and if the com-

(1) (1876) 1 App. Cas. 256. (2) [1891] 1 Q. B. 544.

pany could show that it would be impossible to execute any particular order or set of orders except at a loss, that would be a reason for refusing to execute that order or set of orders; and the company might be able to show that as matters were and as prices were, and as they might be anticipated to be during the remainder of the period, there was very little prospect of any large quantity of business being done. If the official referee came to that conclusion that would go to minimize the amount of the damages very much. If on the other hand he came to the conclusion that the orders could have been executed at a profit, then he would disregard those observations. He gave judgment for the plaintiff.

The defendants appealed.

Ashton, K.C., and *J. D. Crawford*, for the defendants the Union Manufacturing Company. The defendants were not bound by the agreement to carry on their business for the term of seven years so as to continue to employ the plaintiff as their agent during that time: *Rhodes* v. *Forwood* (1); *Ex parte Maclure* (2); *Hamlyn & Co.* v. *Wood & Co.* (3); *Northey* v. *Trevillion*. (4) A term cannot be implied in the contract that the defendants will continue to carry on their business during the seven years. Such a term cannot be implied merely because the Court thinks it a reasonable term; it must be a necessary implication: *Lazarus* v. *Cairn Line*. (5) *Turner* v. *Goldsmith* (6), where the agent was held entitled to recover damages, was decided on facts very different from those in this case and the agreement was a peculiar one. The fact that in the present case part of the consideration for the agreement moving from the plaintiff, namely, the payment of the 1000*l*., was executed makes no difference. What the plaintiff receives from the defendants cannot vary according to what he gave the defendants. [*Carlill* v. *Carbolic Smoke Ball Co.* (7) was also referred to.]

Next, if the defendants were bound to carry on the business, the resolution for the voluntary winding up did not operate as a discharge of the plaintiff: *Midland Counties District Bank* v. *Attwood* (8);

(1) 1 App. Cas. 256.
(2) (1870) L. R. 5 Ch. 737.
(3) [1891] 2 Q. B. 488.
(4) (1902) 7 Com. Cas. 201.
(5) (1912) 17 Com. Cas. 107, 113.
(6) [1891] 1 Q. B. 544.
(7) [1893] 1 Q. B. 256, 271.
(8) [1905] 1 Ch. 357.

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In re Havana Exploration Co. (1); Buckley on Companies, 9th ed., p. 457. By s. 184 of the Companies (Consolidation) Act, 1908, in a voluntary winding up the corporate estate and corporate powers of the company continue until it is dissolved. The powers of the directors continue: *Ladd's Case* (2); see also *Bateman & Co.* v. *Ball.* (3) It differs from a compulsory winding up which operates as a notice of dismissal to the servants of the company: *Midland Counties District Bank* v. *Attwood* (4); though in Palmer's Company Precedents, Part 1, 11th ed., p. 444, it is stated that "it seems, however, doubtful whether this distinction can be maintained, seeing that the corporate existence subsists in a compulsory winding-up as much as in a voluntary winding-up." The plaintiff himself determined the agreement by issuing the writ in the action. He is therefore not entitled to recover. [*In re Marine Mansions Co.* (5); *Ex parte Watkin* (6); *Reid* v. *Explosives Co.* (7); *Burt* v. *Bull* (8); *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (9); and ss. 151 and 158 of the Companies (Consolidation) Act, 1908, were also referred to.]

Cyril Atkinson, K.C., and *Spafford*, for the defendants the Elton Cop Dyeing Company.

Schwabe, K.C., and *Farleigh*, for the plaintiff. With regard to the voluntary liquidation, Bailhache J. was right in coming to the conclusion that the Union Manufacturing Company went into voluntary liquidation because they were insolvent and could not carry on the business unless the plaintiff gave up the Manchester district agency. The plaintiff would have to "stand down." And in addition they sold the business a few months afterwards to another company. The true inference is that the company terminated the agreement with the plaintiff by means of a voluntary winding up. Warrington J. in *Midland Counties District Bank* v. *Attwood* (10) did not mean to decide that a voluntary winding up could never be a discharge of the company's servants. If, however, that is the effect of the decision, it is inconsistent with the authorities: *In re*

(1) [1915] 1 Hansell B. R. 187.
(2) [1893] 3 Ch. 450.
(3) (1887) 56 L. J. (Q.B.) 291.
(4) [1905] 1 Ch. 362.
(5) (1867) L. R. 4 Eq. 601, 610.
(6) (1875) 1 Ch. D. 130.
(7) (1887) 19 Q. B. D. 264.
(8) [1895] 1 Q. B. 276.
(9) (1876) L. R. 3 Ind. Ap. 200.
(10) [1905] 1 Ch. 357.

Patent Floor Cloth Co. (1) The voluntary liquidation may be a determination of the agreement.

Next, the Union Manufacturing Company were bound by the agreement for seven years. The plaintiff has paid for his agency for the seven years, or, as Bailhache J. put it, he bought his agency agreement. That is a very strong point to take into consideration. Further, the company had to approve and execute the orders taken by the plaintiff unless their approval was reasonably withheld. The cases which show that the employer can terminate the agreement by ceasing to carry on business are cases in which the employer need not do any business on which the agent can earn commission. This was so in *Rhodes* v. *Forwood* (2), as was pointed out by Lindley L.J. in *Turner* v. *Goldsmith* (3), and by Collins M.R. in *Ogdens, Ld.* v. *Nelson* (4); and in the latter case Collins M.R. stated that *Rhodes* v. *Forwood* (2) "was a very peculiar case depending on very special circumstances." In *Hamlyn & Co.* v. *Wood & Co.* (5) the defendants were not bound to make any brewers' grains so as to enable them to sell them to the plaintiffs. Collins M.R. stated the true principle in *Ogdens, Ld.* v. *Nelson.* (6) In *Hamlyn & Co.* v. *Wood & Co.* (7) Lord Esher M.R. puts the case of a sum being paid in advance for the grains for ten years, and said that if the plaintiffs did not get grains for ten years, they would not get what they had paid for. That shows that where the consideration is executed, as here, the Court would imply a term that the other party would not voluntarily discontinue the business during the term. *Turner* v. *Goldsmith* (8) governs the present case. *In re Newman, Ld.* (9) was a case of compulsory winding up. [*Measures Brothers, Ld.* v. *Measures* (10) was also referred to.]

Ashton, K.C., in reply. In *Ogdens, Ld.* v. *Nelson* (11) there was "an absolute contract" by the plaintiffs to distribute during a period of four years certain sums among their customers.

(1) (1872) 41 L. J. (Ch.) 476.
(2) 1 App. Cas. 256.
(3) [1891] 1 Q. B. 549.
(4) [1904] 2 K. B. 410, 418, 419; affirmed in H. L. [1905] A. C. 109.
(5) [1891] 2 Q. B. 488.
(6) [1904] 2 K. B. 418.
(7) [1891] 2 Q. B. 492, 493.
(8) [1891] 1 Q. B. 544.
(9) [1916] 2 Ch. 309.
(10) [1910] 2 Ch. 248, 259.
(11) [1904] 2 K. B. 410; [1905] A. C. 109.

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PICKFORD L.J. The question in this case turns upon the construction of the agreement between the plaintiff and the Union Manufacturing Company. The first question is whether by the contract the company were bound to accept the plaintiff's orders, subject to their right of reasonable refusal, during the period of seven years, or whether they were entitled at any time to take up the position that they would no longer carry on the business. In other words, were the company entitled to take up the position which the defendant successfully took up in *Rhodes* v. *Forwood?* (1) [The Lord Justice read clauses 1, 2, 3, and 10 of the agreement.] What is the effect of that contract? If clauses 2 and 10 were not in the contract, there would be a good deal to be said for the contention that the agreement came within the class dealt with in *Rhodes* v. *Forwood.* (1) But when clause 2 as qualified by clause 10 is read, it seems to me that the agreement is not one of that kind. If clause 2 were read, omitting the words as to approval and the words consequential thereon, it would read thus: "The agent shall use his best endeavours to obtain orders for the company's said goods at prices to be from time to time agreed upon between the parties hereto, and all orders obtained by the agent shall be at once communicated to the company who shall carry out and execute such orders without any undue delay and in accordance with the terms thereof." If it was framed in that way I have no doubt it would be an absolute agreement to accept such orders as were brought by the agent during the seven years mentioned in clause 1, and that clause 3 merely provided for the terms of remuneration upon obtaining such orders. What then is the effect of the insertion of the words as to approval? If the words as to approval were unqualified as they stand in clause 2, the company might have an absolute right to approve or reject any order, and therefore they might be under no obligation to accept any order. That, however, is qualified by clause 10, which provides that they shall not withhold their approval except on reasonable grounds.

Reading the agreement as a whole, it seems to me to amount to this: You, the plaintiff, shall be our agent for seven years; you must get all the orders you can; we will accept and carry out those orders, subject to this, that we have a right of reasonable refusal.

(1) 1 App. Cas. 256.

In my opinion that is not an agreement like the one in *Rhodes* v. *Forwood*. (1) We have not to resort to any implied term. There is an express contract that during the term of the agency the company will execute the orders obtained by the plaintiff, which he on his part is bound to use his best endeavours to obtain, subject to a right in the company reasonably to refuse to execute them.

The next question is, was there a breach of that agreement? In my opinion there was. I do not understand that Warrington J. in *Midland Counties District Bank* v. *Attwood* (2) intended to decide that in no circumstances could a voluntary winding up create such a state of things as to amount to a breach of contract by the company which is wound up. It may well be that in the case of certain contracts and in certain circumstances a voluntary winding up may not be a termination of employment or a breach of contract. In the present case the company was wound up because it was insolvent. Bailhache J. has so found, and I think he was right. But before the winding up the company intimated to the plaintiff that they could not and would not go on unless they obtained additional capital, and that unless he could find the capital they would have to find it elsewhere and he would have to "stand down," at any rate so far as Manchester, a very important district, was concerned. Having intimated that to him, they proceeded to carry it out by going into voluntary liquidation and afterwards selling their business. That was, to my mind, a breach of contract. It was an intimation to him that they no longer had any intention of carrying out the contract. It seems to me to matter little whether that was carried out by voluntary liquidation or in any other manner. The voluntary liquidation is only part of the history of the repudiation of the contract by the company. There was therefore a breach of contract.

There is one other matter I should like to mention. I agree with Bailhache J. that an inability to carry out the orders obtained by the plaintiff except at such a loss as would make it unreasonable for the company to carry them out is a reasonable ground for refusing to carry them out. I do not, however, think that the fact that they could not at the time when they went into voluntary liquidation carry them out except at a loss shows that they would have had that

(1) 1 App. Cas. 256. (2) [1905] 1 Ch. 357.

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reasonable ground for refusing all orders for the remainder of the seven years. I do not think that an inability at that time to carry them out except at a loss would justify them in saying that they would carry out no more orders. Therefore Bailhache J. was right in holding that there was a breach, and that on the inquiry as to damages the official referee would have carefully to see whether the circumstances were or were not in fact such that there was no reasonable probability of any business being done during the remainder of the seven years at a reasonable profit at the prices quoted by the plaintiff, or except at a loss to the company. If the official referee comes to the conclusion that the circumstances are such that in all probability throughout the rest of the seven years the company, if they had carried on their business, would have had the right to reject each order on that ground, the damages will be affected; there will be very little damages. But if he comes to the conclusion that, although the times were bad at present, prices might rise or something might happen which would make it possible for the company to carry on business at a profit, he will assess the damages accordingly. Bailhache J. treated this matter in the right way, and his judgment must be affirmed. The appeal will be dismissed.

BANKES L.J. I agree. I do not think it would be of any assistance if I were to go through the cases and to try to find some principle upon which they could all be considered to have been decided. I am content to adopt what Scrutton J. said in *Lazarus* v. *Cairn Line* (1), and I ask myself, Does this contract give the plaintiff a right to a continuing benefit? I think it does. First, I wish to say that I do not attach the same importance as Bailhache J. did to that part of the agreement which provides that the plaintiff is to invest some money in the company; because where a person buys shares in a company it is more correct to describe it, as the plaintiff described it in a letter, as taking a financial interest in the venture rather than as buying an agency for a term of years. Therefore I do not attach any importance to that. Taking the agreement as a whole, I find this: There is first of all an appointment of the plaintiff as agent for a term of seven years. I agree that that in

(1) 17 Com. Cas. 113.

itself would not be sufficient, but I am only indicating such matters as, taken in the whole, lead me to the conclusion at which I have arrived. Secondly, without the necessity of doing so, it is provided that the death of the plaintiff shall put an end to the agreement, there being no provision with reference to the corresponding event, namely, the closing down by the company of its business. Thirdly, the plaintiff is paid by a commission calculated, not upon the profits of the company nor upon all sales of the company's goods—matters over which he has no control—but upon the result of his own labours; and I think that a distinction can be drawn between this case and some of the cases to which we have been referred on that ground. The applicant in *Ex parte Maclure* (1) was to be paid a commission on profits, and in *In re Newman, Ld.* (2) a commission was paid to the managing director "upon all sales effected of the goods of the company." The importance attaching to that kind of payment is well indicated by Sir Robert Collier in *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (3), where he draws a distinction between a man who is paid by salary—and a salary may be arrived at by a commission on the amount or results of a man's work—and a man who is paid by commission. He says that "the man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution . . . . But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company." The man who is paid, as the plaintiff in the present case was, by a commission upon the orders he obtains is not speculating at all upon the results of the company's business. I think that these and all the remaining clauses point to a continuance of the existence of the agreement for the full period of seven years. By far the strongest provision in the plaintiff's favour is that relating to the acceptance of the orders which the plaintiff obtains. By clause 2 the company may accept or reject any orders, but clause 10 qualifies that by providing that acceptance shall not be unreasonably withheld. That provision and the other clauses of the agreement taken together point to the conclusion that the plaintiff shall have the right to the continuing benefit during the full period of seven years.

(1) L. R. 5 Ch. 737. (2) [1916] 2 Ch. 309.
(3) L. R. 3 Ind. Ap. 206.

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There are two other matters. It is said that the facts indicate that the company did not repudiate the agreement, but merely took advantage of the provision which entitled them reasonably to refuse to accept orders. If the company had taken up that position and had indicated to the plaintiff, not that they were going to repudiate the agreement or close down the business, but that for the time being owing to existing conditions they could not accept orders from him at the prices, it would be a different matter. As I read the facts, and as Bailhache J. read them, the company repudiated the agreement on the ground that, owing to their financial position, it was impossible for them to go on. In those circumstances the voluntary liquidation is not the matter upon which the plaintiff is relying. What he is really relying upon are the events which preceded the liquidation, namely, the intimation by the company to the plaintiff that their financial position was such that unless he found the money they would close down the business and he would have to "stand down." In those circumstances the question of the effect of a voluntary liquidation taken by itself without any surrounding circumstances does not arise; nor does the question arise as to what the position of the company would have been had they taken up another attitude and said: We cannot at the moment, nor indeed possibly for some time to come, accept orders at the prices at which you are offering them; when conditions alter and times become better no doubt you will be able to offer us orders at prices which we can accept. In my opinion the judgment was right.

SCRUTTON L.J. This case adds another to the long line of cases in which the Courts have had to consider whether in the case of a contract made with a business firm or company it is possible to terminate the carrying on of the business by the firm or company, and so terminate the contract. I have had to consider those cases as a judge of first instance in *Lazarus* v. *Cairn Line* (1), and I endeavoured to formulate such principles as I thought would guide me in dealing with the matter. After listening to the arguments in this case I see no reason to alter anything I said in that case, except that it has become clear in the course of the present discussion that the third and fourth propositions I endeavoured to lay down may

(1) 17 Com. Cas. 107, 113.

merge into each other, so that owing to the variety of agreements and of facts there may be cases in which it is difficult to say whether they fall within one class or another. Looking at the cases of *Northey* v. *Trevillion* (1) and *Turner* v. *Goldsmith* (2), it becomes obvious that it is difficult to draw a hard and fast line between one case and another. These principles, however, have been clearly established : The first thing is to see what the parties have expressed in the contract ; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract ; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, " What will happen in such a case," they would both have replied, " Of course, so and so will happen ; we did not trouble to say that ; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

Turning to this contract, what have the parties expressed ? In consideration of the plaintiff investing 1000*l.* in the capital of the company the company appoint him as their sole agent for the sale of certain goods for seven years, payment to be by a commission on goods delivered on his orders and paid for ; and the company are to accept and execute all orders sent by the plaintiff unless they have reasonable grounds for refusal. To use the language of Kennedy L.J. in *Measures Brothers, Ld.* v. *Measures* (3), is there an implied condition " that the contract is to remain in force only so long as a certain state of things continues to exist," and if so, what state of things is to exist which is the condition of the contract remaining in force ? As I understand, it is suggested that the contract is only to remain in force so long as the company carry on their business. Is that a necessary implication ? If this matter had been mooted at the time when the contract was being negotiated, I expect that the parties would at once have disagreed as to what the position was. Unless we are satisfied that it is an implication which must necessarily have been in the minds of both parties, we cannot imply a term which they

(1) 7 Com. Cas. 201. (2) [1891] 1 Q. B. 544.
(3) [1910] 2 Ch. 258.

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have not expressed, especially when I see that they have thought sufficiently about the matter to express two conditions on which the agreement is to be determined, first, the obvious one on the death of the agent; and, secondly, by six months' notice after the expiration of the seven years.

Therefore I find an express term that the contract is to continue for seven years, the company having power to refuse orders which they have reasonable grounds to refuse, and no ground for implying a term that the seven years shall be subject to the company continuing to carry on business.

It has been argued that there has been no breach because all that happened was voluntary liquidation, and that can never be a breach. In support of that contention *Midland Counties District Bank* v. *Attwood* (1) was cited. The head-note is as follows: "A resolution for the voluntary winding-up of a limited company does not operate as a notice of discharge to the servants of the company." If that means that a resolution for voluntary winding up is never to discharge the servants of the company, I cannot agree with it. It seems to me that it may or may not be a discharge of the servants according to the facts of the particular case. The reason given is that in the case of a voluntary winding up there is no change in the personality of the employer, whereas in a compulsory winding up there is. I am afraid I do not understand that reasoning. It appears to me that both in a compulsory and voluntary winding up the personality of the company continues until it is dissolved. A different person is managing the affairs of the company; in the case of a compulsory winding up he is appointed by the Court; in the case of a voluntary winding up he is appointed by the company. The company, however, remains in existence until it is dissolved. So far, therefore, as the argument rests on no change of personality I am afraid I cannot appreciate it.

I had some little doubt about the legal position in this case. A resolution to wind up the company voluntarily was passed and confirmed, and five days afterwards the writ in this action was issued, no order having been sent in by the plaintiff in the meanwhile. But having regard to the evidence and the correspondence, and having heard the arguments, I think it is clear that the company by that

(1) [1905] 1 Ch. 357.

resolution intended to stop business with the plaintiff; they treated that resolution as terminating the agreement with him. For the reasons I have given they were wrong in that. There was therefore a repudiation of the contract by the company accepted by the plaintiff by the issue of the writ claiming damages for the breach. I desire to express my entire agreement with what has been said by Bailhache J. and Pickford L.J. that it by no means follows that the damages are to be assessed on the assumption that a flourishing business was going to be carried on for the remainder of the seven years. The official referee will have to consider what was the probability that orders could have been obtained at prices which would have been profitable to the company, so that the company could not reasonably have rejected them; and on the other hand, if the price which would have been profitable to the company was such that no orders could have been obtained, the official referee will have to take that into account in estimating what the plaintiff has lost by the stoppage of the business. The price was to be agreed, and no order need have been accepted at that price if there was reasonable ground for refusing it. It might be that the profitable prices would have been so large that no orders could have been obtained. Therefore it may be that the official referee will find that the damages are extremely small. The official referee will have carefully to consider this aspect of the case.

For these reasons I agree with the judgment of Bailhache J.

Appeal dismissed.

Solicitor for plaintiff: *Ralph Raphael.*

Solicitors for defendants: *Grundy, Kershaw, Samson & Co.; Pritchard, Englefield & Co., for Butcher & Barlow, Bury.*

W. F. B.

Considered. LEAF *v.* INTERNATIONAL GALLERIES [1950] 2 K. B. 86

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Feb. 5, 6.

[IN THE COURT OF APPEAL.]

T. & J. HARRISON AND OTHERS *v.* KNOWLES & FOSTER.

[1916 H. 929.]

Contract—Sale of Ships—Particulars—Incorrect Statement as to Dead-weight Capacity—Condition or Warranty—"Not accountable for errors in description."

The defendants, being desirous of selling two steamships to the plaintiffs, gave to the plaintiffs particulars in writing of the ships which stated, inter alia, that the dead-weight capacity of each ship was 460 tons. The particulars also contained the words "not accountable for errors in description." The plaintiffs relying upon the particulars, agreed to buy the ships, and a memorandum of the contract, which did not in terms refer to the particulars, was signed by the parties on December 9, 1915. The ships were delivered to, and accepted by, the plaintiffs, and it was subsequently discovered that the dead-weight capacity of each ship was only 360 tons. In an action by the plaintiffs to recover damages for a breach of a condition of the contract, and, alternatively, for breach of warranty:—

Held, on the evidence, that the statement in the particulars of the ships as to the dead-weight capacity, which was made bona fide, was not part of the contract, and that the defendants were not liable.

Judgment of Bailhache J. [1917] 2 K. B. 606 affirmed on the facts.

APPEAL from the judgment of Bailhache J. at the trial of the action without a jury: reported [1917] 2 K. B. 606.

Inasmuch as the Court of Appeal decided the case upon a question of fact, it is not necessary to set out the facts and arguments. The facts are summarized in the head-note.

The plaintiffs claimed damages for a breach of a condition in a contract for the sale of two steamships by the defendants to the plaintiffs. Alternatively, they claimed damages for a breach of warranty.

Bailhache J. held, first, on the evidence, that the memorandum was not intended by the parties to contain all the terms of the contract, and that the statement in the particulars as to the dead-weight capacity was a term of the contract; secondly, that the discrepancy between the statement and the fact was a difference

of degree and not of kind, and that the statement was, therefore, a warranty and not a condition; and, thirdly, that, the statement being a warranty, the defendants were, by reason of the words "not accountable for errors in description," not liable for damages for breach of warranty.

The plaintiffs appealed.

R. A. Wright, K.C., and *Claughton Scott*, for the plaintiffs.

Greer, K.C., and *A. Neilson*, for the defendants, were not called upon.

PICKFORD L.J. (after stating the facts and reading the documents). I take a different view from that arrived at by the learned judge as to whether the particulars were intended to be made part of the contract. I do not think they were. The document of December 9, 1915, was, in my opinion, intended to be a memorandum of the terms of the contract, and, if so, the particulars were not part of the contract. The particulars merely contained a representation made innocently as to the dead-weight capacity of the ships, which may have induced the plaintiffs to enter into the contract, but which afforded no ground for a claim for damages for breach of contract. With regard to the decision of the learned judge that the statement in the particulars as to dead-weight capacity was not a condition but a warranty, and that the discrepancy between 460 and 360 tons did not make the ships different commercially from those described, I will say no more than that it is a decision by a learned judge from whom I should be loth to differ; but before coming to a decision on the point I should desire to hear the defendants' counsel in support of it.

WARRINGTON L.J. agreed. The statement in the particulars as to the dead-weight capacity of the ships was a statement preliminary to the contract, and not part of it. It was not disputed that the particulars were in one sense the basis of the contract, and if the statement were untrue in a material particular, though made innocently, it might be a ground for rescinding the contract. But there is a difference between a statement of fact which gives rise to a right to rescind and a statement of fact which gives rise

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to a claim for damages. I have nothing to add to what Pickford L.J. has said as to the decision of Bailhache J.

SCRUTTON L.J. I agree with the result arrived at by Bailhache J., but I arrive at that result by a different road. A statement may form part of a contract which the party making it promises to be true, or it may be an innocent representation of fact which he does not promise to be true, but which, if it was it was untrue in a material particular, and formed part of the inducement to enter into the contract, may give rise to a claim to rescind, but does not give rise to a claim for damages. It is a question of intention whether a representation amounts to a warranty: *Heilbut, Symons & Co.* v. *Buckleton* (1); see also *Wallis, Son & Wells* v. *Pratt & Haynes.* (2) In my opinion the particulars formed no part of the contract between the parties. If they had formed part of the contract I should have desired to hear the defendants' counsel in support of the decision as to the discrepancy between 460 and 360 tons dead-weight capacity.

Appeal dismissed.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Botterell & Roche.*

(1) [1913] A. C. 30. (2) [1911] A. C. 394.

W. F. B.

[IN THE COURT OF APPEAL.]

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W. MILLAR & CO., LIMITED *v.* OWNERS OF S.S. FREDEN.

[1916 W. 2018.]

Shipping—Charterparty—Guarantee by Shipowner that Ship's "dead-weight capacity" is specified Number of Tons—Meaning of Expression—Cargo of Maize—Ship capable of lifting specified Number of Tons—Cubic Capacity insufficient to take on Board that Weight of Maize—Whether Breach of Guarantee by Shipowner.

A printed form of charterparty provided that the ship should load and the charterers provide a full and complete cargo of maize (the words "wheat and/or flour and/or other lawful merchandize" which were in the printed form being struck out). The ship was then to proceed and discharge at one of a number of ports as ordered by the charterers. The freight was to be payable at and after rates varying according to the port of discharge. Then followed the clause "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity." That clause was substituted for a printed clause which made freight payable per ton of wheat and/or flour delivered, or, if other cargo was shipped, on a full cargo of wheat and/or flour. The effect of the alteration was to make the charterparty one at a lump sum freight, varying with the port of discharge. The ship in fact had a lifting capacity of 3200 tons, but she had not cubic capacity to take on board that weight of maize:—

Held, affirming the decision of Rowlatt J. [1917] 2 K. B. 657, that the primary meaning of the phrase "ship's dead-weight capacity" was not her capacity to carry tons of maize, but her abstract lifting capacity, and that the mere fact that maize was mentioned as the cargo to be carried in the earlier part of the charterparty did not change the meaning of the phrase from a designation of the ship's lifting capacity in the abstract to a designation of her combined lifting and cubic capacity applied to the ratio of bulk to weight existing in maize.

APPEAL from a decision of Rowlatt J. in an action in the commercial list tried before him without a jury. (1)

The plaintiffs, who were the charterers of the steamer *Freden*, claimed damages for breach of a charterparty dated December 23, 1915. The charterparty provided that the ship should proceed to Durban and there load a full and complete cargo of maize in

(1) [1917] 2 K. B. 657.

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bags, and being so loaded should proceed as ordered by charterers to any one safe port in the United Kingdom, freight being payable at certain rates, varying according to the port of discharge, and the charterparty contained the following clause: "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity."

The ship, in fact, had a lifting capacity of 3200 tons, but she had only cubic capacity to take on board 3081 tons 560 lbs. of maize, i.e., 118 tons 1680 lbs. less than 3200 tons, and the plaintiffs claimed the sum which represented the freight they had paid in respect of the 118 tons 1680 lbs. which could not be loaded as damages for breach of the guarantee.

Rowlatt J. dismissed the action, and the plaintiffs now appealed. The terms of the charterparty are fully set out in the report in the Court below.

MacKinnon, K.C., and *R. A. Wright*, for the appellants. The true meaning of this contract is a guarantee by the owners to carry 3200 tons of maize. These is no dispute as to the facts, nor as to the amount of the damages. Prima facie the parties are dealing with the carriage of a cargo of maize. They fix the rate of freight per ton, and instead of weighing the cargo at the port of delivery the owners guarantee that their ship will carry 3200 tons and fix a lump sum rate in that way. Construing the charterparty in the light of the surrounding circumstances, the most natural construction is that the parties were calculating the amount of the freight with regard to the cargo which was to be carried and not with regard to an abstract question of the capacity of the ship. They were in fact contracting with reference to the weight of maize to be carried. In *Mackill* v. *Wright* (1) a lump sum freight was to be paid, the owners guaranteeing that the vessel should carry not less than 2000 tons dead-weight. The charterers tendered an abnormal cargo not tallying with the description in the charterparty, and only 1691 tons could be loaded. It was held that the charterers were not entitled to the benefit of a stipulation for reduction of freight and that the whole lump sum freight was payable. The point in this case was never sought to be raised

(1) (1888) 14 App. Cas. 106.

there. Lord Halsbury said (1): "The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead-weight. But . . . . if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting." And Lord Watson said (2): "Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure; and wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description." Here the cargo in the contemplation of the parties was maize in bags, and the contract was to carry 3200 tons. The guarantee was as to dead-weight given in relation to the particular kind of cargo which was the subject-matter of the contract. We rely to some extent upon the collocation in the charterparty of the guarantee clause as showing that it was not a mere description of the ship. In *Carnegie* v. *Conner* (3) the charterers tendered an abnormal cargo. [They also referred to Scrutton on Charterparties, 8th ed., art. 25, pp. 76-78, and Carver on Carriage by Sea, 6th ed., p. 199, s. 141 (*a*).]

Leck, *K.C.*, and *A. Neilson*, for the respondents, were not called upon.

SWINFEN EADY L.J. (after stating the facts). The charterparty is between the plaintiffs and the defendants for the ship to carry from Durban to a port in the United Kingdom a full and complete cargo of maize in bags. Then there is a rate of freight per ton according to the port of call at which she should be directed to discharge. There are different rates for different ports, but nothing

(1) 14 App. Cas. 114. (2) Ibid. 116.
(3) (1889) 24 Q. B. D. 45.

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turns upon that. Then comes the clause upon which the whole contest has turned: "The owners guarantee the ship's dead-weight capacity to be 3200 tons and freight to be paid on this quantity." So that in order to ascertain the amount to be paid for freight all that one has to do is to multiply the number of tons, 3200, by the rate per ton according to the port of discharge ultimately selected. It was therefore a contract for a lump sum freight and not for freight so much per ton delivery on arrival. There is no dispute that the vessel was of a dead-weight capacity of 3200 tons—in other words, that she would take on board a cargo to that extent without sinking the ship below her proper load-line. With regard to the particular cargo of maize she was only able to take on board 3081 tons 560 lbs., but that was not because her dead-weight capacity was not as guaranteed, or had been in any way misrepresented. It was because the cubic capacity of the space on board was insufficient to allow of the stowage of more than 3081 tons 560 lbs. of maize in bags. On the one hand it is said on behalf of the appellants, reading the guarantee of the capacity of the ship in connection with the cargo, that the shipowners had notice of what the cargo was to be. It was maize in bags, and it is said that the guarantee must be read as if it meant "We guarantee that the ship on this voyage will be of a capacity to take, and will be able to carry, 3200 tons of maize in bags." On the other hand the respondents say "That is not the language which is used, and that is not what we meant. What we said was, and what we adhere to is, 'We guarantee that the ship shall be and is of a dead-weight capacity of 3200 tons, and so it is.'" The guarantee is a measure of the capacity of the ship, the general capacity irrespective of the particular cargo that she was to carry on this voyage.

Reading the language as it stands in the contract, the words seem to me to be free from ambiguity. "The owners guarantee the ship's dead-weight capacity to be 3200 tons." They guarantee the ship's dead-weight capacity—nothing to do with what the ship will carry, nothing to do with a particular voyage, but the general capacity of the ship. Rowlatt J. (1), applying this language to the proposition which he was considering, said: "To test it by approaching the matter from the opposite point of view: assume

(1) [1917] 2 K. B. 662.

the parties to have decided to provide for the carriage of a cargo of maize at a freight calculated on the guaranteed dead-weight capacity of the ship in the strictest sense, would they not have written down exactly what they have written here?" That is quite a proper test to apply. In my opinion there is here a clear and definite agreement that freight was to be paid by way of a lump sum calculated upon the guaranteed dead-weight capacity of the ship, the charterers being entitled, and indeed bound, to load a full and complete cargo. I am unable to extract the construction which the appellants desire to put upon the clause from the language used according to its natural and ordinary meaning.

Reference was made to *Mackill* v. *Wright*. (1) The dispute there was whether the cargo that was actually shipped corresponded to that which was intended, having regard to the representations made at the time the contract was entered into. But it will be observed that the language of the contract there was very different from what we have to consider here. There it was "the owners guarantee that the vessel shall carry not less than 2000 tons dead-weight of cargo." Now that must have been a guarantee that the vessel should carry that amount on the voyage in question; and then there was a subsequent clause: "and should the vessel not carry"—that is, should the vessel not carry on this particular voyage—"the guaranteed dead-weight as above, then any expense incurred from this cause to be borne by the owners and a pro rata reduction per ton to be made from the first payment of freight." So that there was language there pointing to a guarantee with regard to the weight of cargo to be carried on that particular voyage, and not to the general carrying capacity of the ship. Here it is the opposite. The only guarantee is with reference to the general carrying capacity of the ship—a certain dead-weight capacity.

In my opinion the appeal fails and should be dismissed.

BANKES L.J. I agree. The expression "the ship's dead-weight capacity" in my opinion has reference primarily to the vessel's lifting or weight-carrying capacity in the abstract, and I find nothing either in the position in which the words are used in this charterparty or in any other of the provisions of the charterparty

(1) 14 App. Cas. 106.

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Bankes L.J.

itself to displace that primary meaning and lead to the conclusion that the secondary meaning ought to be adopted here as contended for by the appellants. That, in my opinion, is sufficient to dispose of the appeal. But I think it is possible to go further and to say that the words themselves negative the contention, because, if I understood Mr. MacKinnon's argument, it is that you ought to read into the clause in the charterparty after the words "3200 tons" the words "of maize." So reading the clause it runs thus: "The owners guarantee the ship's dead-weight capacity to be 3200 tons of maize in bags and freight to be paid on this quantity." Now that is just what the parties did not want. They wanted to provide that freight was not to be paid on the quantity of maize or the quantity of bags; they desired that freight should be paid on a tonnage—that is to say, the tonnage in the abstract of the vessel. I think if those words are read into the clause it negatives the argument that has been addressed to us in support of the appeal.

With reference to the case of *Mackill* v. *Wright* (1), it seems to me that the language in that case had reference to the particular contract, which indicated on the face of it that the parties were contracting with reference to the capacity of the vessel in regard to that particular voyage, which, as indicated on the face of the charter, was one on which a certain class of cargo was to be carried. In my opinion that language has really no reference to the case we have to decide.

On these grounds I think the appeal fails and should be dismissed.

EVE J. Our judgment involves the construction of this particular contract, the terms of which are essentially different from those of the contract with which the House of Lords had to deal in the case of *Mackill* v. *Wright*. (1) Here the guarantee is the guarantee of an existing fact, not a representation as to the quantity of the particular cargo which the ship could accommodate.

I think the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Sturton & Sturton.*

Solicitors for respondents: *Botterell & Roche.*

(1) 14 App. Cas. 106.

G. A. S.

THE KING *v.* FRANCIS.
Ex parte MARKWALD.

1918
Feb. 13, 15.

Alien—Restriction—German-born Subject—Naturalization in Australia—Oath of Allegiance—Status in United Kingdom—Aliens Restriction (Consolidation) Order, 1916.

A natural-born German subject left Germany in 1878 and went to Australia, where in 1908 he took the oath of allegiance to His Majesty and was granted, under the powers conferred by the Commonwealth of Australia Naturalization Act, 1903, a certificate of naturalization by which he became entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in the Commonwealth. He subsequently became a resident in London and was charged, and convicted, for that, being an alien, he had failed to furnish to a registration officer the particulars required by the Aliens Restriction (Consolidation) Order, 1916:—

Held, that the taking of the oath of allegiance and the grant of the certificate of naturalization in Australia did not make the man a British subject in the United Kingdom, that he was, therefore, an alien when in the United Kingdom, and that the conviction was right.

RULE NISI calling upon a metropolitan police magistrate to show cause why he should not state a case for the opinion of the Court.

The rule had been granted to one Markwald, who had been charged, and convicted, at the Westminster Police Court for that he, being an alien resident in London, had failed to furnish to a registration officer the particulars required by the first part of the Fourth Schedule to the Aliens Restriction (Consolidation) Order, 1916, contrary to clause 19 (1.) (*a*) of the Order.

The applicant was born in Berlin in 1859. He left Germany in 1878, and went to Australia, where a certificate of naturalization was granted to him in 1908. The certificate of naturalization was in the following terms:—

"*Commonwealth of Australia.*—Certificate of Naturalisation. By virtue of the Naturalisation Act, 1903, I, the Governor-General in and over the Commonwealth of Australia, with the advice of the Federal Executive Council, grant to Heinrich Hermann Markwald an alien, being a native of Prussia in Germany and of the age of

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forty-eight years, this certificate of naturalisation whereby the said Heinrich Hermann Markwald becomes entitled to all political and other rights, powers, and privileges, and becomes subject to all obligations to which a natural born British subject is entitled or subject in the Commonwealth. Provided that where by any provision of the Constitution, or of any Act, or State Constitution or Act, a distinction is made between the rights, powers, or privileges of natural born British subjects and those of persons naturalised in the Commonwealth or in a State, the rights, powers, and privileges conferred by the granting of this certificate shall for the purpose of that provision be only those (if any) to which persons so naturalised are therein expressed to be entitled. Given under my hand and the Great Seal of the Commonwealth of Australia, at Melbourne the twenty second day of January, one thousand nine hundred and eight.—Northcote, Governor-General. By His Excellency's Command, Alfred Deakin. Enrolled as of record by filing duplicate in Register of Naturalisation Certificates, vol. 6, page 5467. Atlee Hunt, Secretary, Department of External Affairs."

Before the certificate was issued to the applicant he was required to, and did, take the oath of allegiance.

The magistrate found as a fact that the applicant had not proved to his satisfaction that he was not an alien, and that he had therefore failed to discharge the onus placed upon him by s. 1, sub-s. 4, of the Aliens Restriction Act, 1914. In these circumstances the magistrate considered that it would be useless for him to state a case.

On the argument of the rule it was agreed that, as all the facts were before the Court, the question should be dealt with on the footing that a case had been stated.

Travers Humphreys showed cause against the rule. The Aliens Restriction (Consolidation) Order, 1916, by clause 19 (1.) (*a*), provides that all aliens must be registered, and by s. 1, sub-s. 4, of the Aliens Restriction Act, 1914, the onus is on the applicant to prove that he is not an alien. The question, therefore, is whether, on the evidence, the magistrate was bound to hold as a matter of law that the applicant was not an alien. At the date when the certificate of naturalization was issued to the applicant in Australia

the Naturalization Act, 1870, was in force, and by s. 16 of that Act laws made by the Legislature of any British possession for imparting to any person the privileges of naturalization "to be enjoyed by such person within the limits of such possession" shall within these limits have the authority of law. Sect. 16 was re-enacted by s. 26, sub-s. 2, of the British Nationality and Status of Aliens Act, 1914. By the Commonwealth of Australia Constitution Act, 1900, s. 9, ch. 1, Part V., s. 51, power was given to the Parliament of the Commonwealth to make laws with respect to, inter alia, "naturalization and aliens." Sect. 8 of the Commonwealth of Australia Naturalization Act, 1903, provides that a person to whom a certificate of naturalization is granted shall "in the Commonwealth be entitled to all political and other rights, powers, and privileges" to which a natural-born British subject is entitled in the Commonwealth. It is clear, therefore, that there was no power to grant a certificate of naturalization to the applicant in Australia which would affect his nationality in the United Kingdom, and the certificate, the language of which follows the language of s. 8, does not purport to do so. The Parliament of the Commonwealth could not confer upon the applicant the status of a British subject in the United Kingdom. In order to acquire that status it would be necessary for the applicant to obtain either a certificate of naturalization in the United Kingdom under s. 2 of the Act of 1914 or a certificate of Imperial naturalization from the Government of the Commonwealth under s. 8 of that Act, assuming that that Government has adopted Part II. of the Act of 1914, as to which there is no evidence. When the applicant is in the United Kingdom he must be either a British subject or an alien, and it is clear that he is not the former. Further, it is not certain that the applicant has completely divested himself of his German nationality. This depends on German law, the effect of which was considered in *Ex parte Weber* (1) and *Rex* v. *Vine Street Police Station Superintendent.* (2) [He also referred to *Simon* v. *Phillips.* (3)]

Sir Ernest Pollock, K.C. (*McCurdy* with him), for the applicant, in support of the rule. Although the political rights and privileges conferred on the applicant by his becoming naturalized

(1) [1916] 1 A. C. 421.
(2) [1916] 1 K. B. 268.
(3) [1916] W. N. 38; 80 J. P. 197.

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in Australia are limited to those which a natural-born British subject is entitled to in Australia, yet the operative effect of the naturalization is not confined to Australia. For example, it enables the applicant to become the owner of a British ship: see the Merchant Shipping Act, 1894, s. 1; and he becomes subject to the jurisdiction of His Majesty under the Foreign Jurisdiction Act, 1890, and he is entitled to the privileges of the Foreign Marriage Act, 1892. But apart from this question as to the effect of naturalization in Australia, the applicant became a British subject, and ceased to be an alien within the meaning of the Restriction Order, as a result of his having taken the oath of allegiance to His Majesty: *Calvin's Case* (1); Comyns' Digest, tit. "Alien"; Co. Litt. p. 129a. By s. 27 of the British Nationality and Status of Aliens Act, 1914, the expression "alien" means a person who is not a British subject, and the word "alien" in the Aliens Restriction Act, 1914, must be taken to have that meaning also.

Having taken the oath of allegiance the applicant has acquired the status of a British subject and has ceased to be an alien, and he is therefore entitled to the protection of the Crown wherever he may be. If he fought for Germany against England he would be guilty of treason. According to German law the applicant by becoming naturalized in Australia lost his German nationality. [He also referred to *In re Stepney Election Petition.* (2)]

Cur. adv. vult.

Feb. 15. DARLING J. In this case a rule was obtained by Sir Ernest Pollock calling upon Mr. Francis, one of the metropolitan police magistrates, to state a case in regard to a decision of his concerning a man named Markwald. When the case came on for argument it was agreed to treat the case as though the rule had been made absolute to state a case and the case had been stated, as the magistrate has made an affidavit which sets out the facts just as fully as though he had stated a case, and the Court is therefore in the same position as if the rule had been made absolute and a case had been stated for the opinion of the Court. [The learned judge read the following judgment:—]

By the Aliens Restriction (Consolidation) Order, 1916, clause 19,

(1) (1608) 7 Rep. 1a. (2) (1886) 17 Q. B. D. 54.

an alien is obliged to comply with certain requirements of registration. Heinrich Hermann Markwald has declined to comply; and the question is whether he has proved that he is not an alien. This issue is on him.

Markwald was born in Berlin in 1859. He left Germany in 1878, and in 1908 obtained a certificate of naturalization in the following terms: [The learned judge read the certificate as above set out.] Unless that certificate has given him a different status, Markwald remains an alien so far as the United Kingdom is concerned, for he has obtained no other title to be regarded as a subject of the King. That he is now one of His Majesty's subjects in Australia is indisputable; but it does not follow that he is as fully one of those subjects as if he had been born within His Majesty's kingdom or his dominions, or had received a certificate of naturalization from one of His Majesty's Secretaries of State. The power to grant such certificates as that which Markwald has received is given by the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 9, part 5, s. 51, in these words: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to"; then there are mentioned a variety of matters, and No. 19 of those matters is "naturalization and aliens." Acting within the limits of the powers so delegated, the Legislature of the Commonwealth of Australia passed the Naturalization Act of 1903 with His Majesty's assent. Sects. 5, 6, and 7 of that statute deal with the granting of certificates of naturalization, and s. 8 is in these words: "A person to whom a certificate of naturalization is granted, shall in the Commonwealth be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth. Provided that where by any provision of the Constitution, or of any Act, or State Constitution or Act, a distinction is made between the rights, powers, or privileges of natural-born British subjects and those of persons naturalized in the Commonwealth or in a State, the rights, powers, and privileges conferred by this section shall for the purpose of that provision be only those if any to which persons so naturalized are therein expressed to be entitled." It appears to me that, by virtue of the very words of this s. 8, the rights, powers,

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Darling J.

privileges, and obligations of the person who receives such a certificate, are limited to the Commonwealth and the bounds thereof, except in regard to one or two instances, in respect to shipping, &c. If the allegiance owing by Markwald in respect of his having become a subject of His Majesty be within any of the four kinds of ligeance described in Coke upon Littleton (see *Calvin's Case* (1)), then I think this is a form of ligeantia legalis. Be that as it may, I am of opinion that a man by virtue of such a certificate of naturalization as was granted here and of the oath of allegiance may become the liege subject of the King in some part of his dominions yet not in all ; and wherever he is not a subject he is an alien.

For these reasons I think that the rule should be discharged.

BRAY J. I agree, and for the reasons stated by my Lord, but I ought, perhaps, to deal a little more fully with some of the points raised by Sir Ernest Pollock. He contended that even if the certificate of naturalization did not make his client a British subject in the United Kingdom, the fact that he took the oath of allegiance did so. Let us see what this means. The Legislature here were most careful to give the Commonwealth by the Act of 1900 limited powers only. The powers of the Commonwealth Parliament were confined to making laws for the peace, order and good government of the Commonwealth, and my Lord has read the section. The Australian Act of 1903 also gives only limited powers of naturalization : see s. 8. The certificate of naturalization contained the same limitations ; it affected only the rights and obligations in the Commonwealth, yet it is said that inasmuch as this man had taken the oath of allegiance which every person who is naturalized has to take, his status in the United Kingdom was immediately altered, and he became a British subject there, in defiance of these restrictions. This is an impossible result. I see no difficulty in a man becoming a British subject in the Commonwealth and not in the United Kingdom if an Act of a State, acting within its powers, so enacts ; and that is what, in my opinion, the Commonwealth Act of 1903 did enact.

Sir Ernest Pollock referred to several Acts of Parliament which give certain privileges to naturalized persons which no one who was an alien previously had. Let me take as an illustration the

(1) 7 Rep. 1a.

Merchant Shipping Act, 1894. By s. 1 it was enacted that "A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description: namely . . . . (*b*) Persons naturalized by or in pursuance of an Act of Parliament of the United Kingdom, or by or in pursuance of an Act or Ordinance of the proper Legislative authority in a British possession." Undoubtedly Markwald would come within that definition and would be entitled to be an owner of a British ship: but that does not make him a British subject; it merely gives him one of the privileges which a British subject would have. The position is the same with regard to the other Acts, and I need not refer to them.

It was also contended that the word "alien" in the Aliens Restriction Act, 1914, has a special meaning, that it has the same meaning as in the British Nationality and Status of Aliens Act, 1914. I agree. But see what follows. The power of the Secretary of State to grant certificates of naturalization is given by s. 2, which provides that he "may grant a certificate of naturalization to an alien who makes an application for the purpose," and, except in the special circumstances dealt with in s. 4, it is only an alien who can make the application. If Sir Ernest Pollock is right, his client is in this unfortunate position, that, by reason of having become naturalized in the Commonwealth of Australia, he has debarred himself from becoming naturalized in this country. That again would be absurd.

In my opinion the authorities which were cited have no real bearing on the point we have to decide. Even assuming that Markwald has lost absolutely his status as a German subject, he still remains an alien in the United Kingdom. In my opinion Markwald wholly fails to show he is not an alien, and the decision of the magistrate was quite right.

A. T. LAWRENCE J. read the following judgment:—This is a motion calling upon a metropolitan police magistrate to state a case for the opinion of the Court. By consent the matter has been heard upon the merits on the facts stated in the affidavits and exhibits filed upon the rule.

The applicant was summoned for failing to furnish the particulars required by the Aliens Restriction (Consolidation) Order, 1916.

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The material facts are these: The applicant was born in Berlin in 1859. He left Germany in 1878 and resided in Australia, where in 1908 he obtained a certificate of naturalization within the Commonwealth of Australia. This naturalization was granted pursuant to the Commonwealth of Australia Naturalization Act, 1903, ss. 7 and 8. The statute itself is enacted by virtue of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 9, part 5, s. 51, sub-s. 19. I can find nothing in these statutes enabling the Governor-General in Council to grant certificates conferring, or affecting, rights within the United Kingdom. Such certificates seem to me to confer rights and duties within the Commonwealth only. The effect they have is to give the applicant the rights of a British subject within the Commonwealth, subject to the proviso to s. 8. We were referred to certain other statutes which give him other rights, such as the Foreign Jurisdiction Act, 1890, the Foreign Marriage Act, 1892, and the Merchant Shipping Act, 1894, but none of these affect his status in the United Kingdom. Before this limited naturalization he was an alien. Nothing but naturalization under powers conferred by Act of Parliament of the United Kingdom can make him other than an alien in the United Kingdom. If this certificate of naturalization had purported to confer upon him the rights of a British subject within the United Kingdom it would have been ultra vires. It does not, of course, purport to do anything of the sort. It is limited in its application to rights and duties within the Commonwealth. And the oath of allegiance which was relied upon by Sir Ernest Pollock does not appear to me to extend the limits of the applicant's naturalization. It is quite true that allegiance creates reciprocal rights and duties. Allegiance is not created by the oath, it exists apart from it; and before any oath has been taken, as in the case of the natural-born subject, so also in the case of the foreigner resident within this country or within the dominions of the King. The oath of allegiance does but consecrate the allegiance already existing. It is ex provisione hominis, as stated in *Calvin's Case.* (1) This applicant's allegiance is local allegiance, and no authority has been given by the sovereign power to any one to accept any wider allegiance from him. This seems to me to be the result in law, and I cannot ignore the fact that the

(1) 7 Rep. 1a.

practical considerations which would determine the grant or refusal of naturalization in far-away Australia are different from those which ought to guide the authorities in granting naturalization within the United Kingdom.

I think the magistrate was right. The applicant has failed to show that he is anything other than an alien in law within the limit of the United Kingdom, and the rule must be discharged with costs.

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Rule discharged.

Solicitors for prosecution: *Wontner & Sons.*
Solicitor for applicant: *Alfred D. Levi.*

F. O. R.

[IN THE COURT OF APPEAL.]

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Feb. 22, 25, 26.

WINTERBOTHAM, GURNEY & CO. *v.* SIBTHORP AND COX.

[1917 W. 812.]

Practice—Trial—Jury—Verdict for Defendant—Perverse Finding—Appeal—Jurisdiction of Court of Appeal to enter Judgment for Plaintiff—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 4.

Where upon an appeal by a plaintiff to the Court of Appeal from the verdict and judgment for the defendant it appears that all the facts are before the Court, and the Court is satisfied that the evidence is such that only one possible verdict could be reasonably given, the Court is not bound to order a new trial, but has jurisdiction under Order LVIII., r. 4, and ought to exercise it by directing judgment to be entered for the plaintiff notwithstanding the verdict of the jury.

Millar v. *Toulmin* (1886) 17 Q. B. D. 603, *Paquin, Ld.* v. *Beauclerk* [1906] A. C. 148, and *Skeate* v. *Slaters, Ld.* [1914] 2 K. B. 429 considered.

APPEAL by the plaintiffs from the verdict and judgment given at the trial of the action by Lush J. with a special jury.

The action was brought by the plaintiffs, a firm of solicitors carrying on business at Cheltenham, on a bill of exchange for 1000*l.* dated April 3, 1917, drawn by the defendant Sibthorp and accepted by the defendant Cox payable to the order of the defendant Sibthorp

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twenty-one days after date, and indorsed by the defendant Sibthorp to the plaintiffs. The bill was duly presented for payment and dishonoured, notice of which was given to the defendant Sibthorp.

The defendant Cox by his defence denied that he accepted the bill, or that the defendant Sibthorp indorsed it to the plaintiffs for value, or that the plaintiffs were the holders thereof in due course. In the alternative he pleaded that if he accepted the bill he was induced to accept the same by the fraud of the drawer, who indorsed the same to the plaintiffs in fraud of this defendant and without consideration and with notice of the fraud.

The defendant Sibthorp entered an appearance in the action, but did not deliver a defence.

The facts of the case, so far as they are material to this report, were shortly as follows:—One Freeman was interested in certain patents. The plaintiffs and clients of theirs were also interested in these patents with Freeman, and they or some of them had lent money to him. Freeman being in want of money, the defendant Sibthorp had by an agreement dated April 5, 1917, agreed to finance him up to the sum of 2000*l.* In the process of financing the defendant Sibthorp gave Freeman a cheque which Freeman paid into his bank and drew upon it. The cheque was subsequently dishonoured. Freeman thereupon consulted his solicitor, Mr. Welch, a member of the firm of Elvy Robb & Welch, of London. The matter of a loan to him was discussed between them, and Mr. Welch suggested that the plaintiffs, as being interested in the patents, should be communicated with. Communications thereupon took place between Mr. Welch and the plaintiffs, and ultimately an arrangement was come to under which the plaintiffs advanced a sum of 300*l.* at 6 per cent. interest to Freeman at the request of the defendant Sibthorp, and the latter gave the plaintiffs a charge on certain debts due to him and deposited with them the bill of exchange in question with other securities by way of security for the loan. In this transaction Mr. Welch acted as the plaintiffs' London agent.

At the trial the defendant Cox's allegation of fraud in the acceptance of the bill was not seriously contested, and the real issue was whether the plaintiffs were indorsees for value without notice of the fraud. Mr. Welch stated in evidence that he had no knowledge of the fraud. Mr. R. Winterbotham, one of the

partners in the plaintiffs' firm, gave evidence that the negotiations for the loan of the 300*l.* were conducted by his London agents Elvy Robb & Welch, and that he did not know the defendant Sibthorp and knew nothing of the circumstances under which the bill was accepted by the defendant Cox. Mr. W. Gurney, another partner, was called, and stated that he knew nothing about the defendant Cox and had no notice of the transaction under which the bill was obtained.

Lush J. left the three following questions to the jury: (1.) Was Cox induced by fraud to accept the bill? (2.) Did the plaintiffs give value for the bill? (3.) Did they give it in good faith? The jury answered the first and second questions in the affirmative and the third question in the negative. After the jury had answered the questions put to them Lush J. gave judgment for the defendant Cox, but granted an unconditional stay of execution, and put this note at the end of his notes: "I entirely disagree with the verdict and see nothing to justify it."

The plaintiffs appealed, and by their notice of appeal asked that judgment might be entered for them. They complained of the finding of the jury on the third question on the grounds (*a*) that there was no evidence before the jury on which they could reasonably answer the question in the manner they did; (*b*) that the finding of the jury to the question was perverse and unreasonable and against the weight of evidence; and (*c*) that the learned judge misdirected the jury in not directing them to find a verdict for the plaintiffs upon the question.

Sir Ernest Pollock, K.C., and *Herbert-Smith*, for the appellants. The third finding of the jury amounts to a perverse verdict. It is not based upon any evidence which could possibly justify it. The learned judge entirely disagreed with it. The evidence is conclusive that the plaintiffs acted in good faith, and it is submitted that this Court ought, notwithstanding the finding of the jury, to give judgment for the plaintiffs. When the evidence is such that only one verdict can reasonably be given, the Court of Appeal is not confined to granting a new trial: *Millar* v. *Toulmin*. (1) By s. 90 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), a thing is

(1) 17 Q. B. D. 603.

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deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly; whether it is done negligently or not.

[SWINFEN EADY L.J. Suppose you are right, is this Court entitled to give judgment for the plaintiffs?]

Yes. By s. 30, sub-s. 2, "Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud . . . . the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud . . . . value has in good faith been given for the bill." The word "proved" in the first part of that sub-section means proof in the sense that the judge must be satisfied that there is ground for the onus being shifted. The word "proves" in the last few lines of the sub-section must have the same meaning, so as to give this Court the right to give a verdict for the plaintiff: *Tatam* v. *Haslar*. (1) This Court has all the facts before it, and is in a position to give judgment for the plaintiffs.

C. M. Pitman, for the defendant Cox. The onus being shifted on to the plaintiffs to prove that they gave value in good faith, it is for the jury to find whether they have discharged that onus, and the jury having found for the defendant on that issue, the Court of Appeal ought not to give judgment contrary to that finding: *Metropolitan Ry. Co.* v. *Wright* (2); *Toronto Ry. Co.* v. *King*. (3)

[SWINFEN EADY L.J. The Court is agreed that the verdict is unreasonable and cannot stand. The question is, ought we to enter judgment or order a new trial?]

This Court can only order a new trial.

[BANKES L.J. referred to *Skeate* v. *Slaters, Ld.* (4)]

That is a clear decision that the Court of Appeal has power under Order LVIII., r. 4 (5), to enter judgment for a defendant if upon the case as a whole the evidence is so weak that a verdict in his favour would have been set aside as unreasonable. Emphasis was there

(1) (1889) 23 Q. B. D. 345.
(2) (1886) 11 App. Cas. 152.
(3) [1908] A. C. 260.
(4) [1914] 2 K. B. 429, 436, 439.
(5) Order LVIII., r. 4: "The Court of Appeal shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. . . . ."

laid upon the fact that the Court had power to enter a negative judgment. The Court has no power to enter an affirmative judgment. It cannot usurp the province of a jury. With the exception of *Millar* v. *Toulmin* (1) all the reported cases have been cases in which the Court has been asked to enter a negative judgment.

Sir Ernest Pollock, K.C., was not called upon to reply.

SWINFEN EADY L.J. This is an appeal of the plaintiffs, and they ask for judgment or a new trial of the action which was tried before Lush J. and a special jury: upon the findings of the jury the judge gave judgment for the defendant. The action is brought upon a bill of exchange drawn by one Sibthorp upon and accepted by the defendant Cox, indorsed to the plaintiffs. The defendant Cox pleaded that the bill was obtained from him by fraud, whereupon the reply of the plaintiffs was: "We are holders for value without notice of the fraud," and upon those issues the action went to trial. The judge put the following questions to the jury: (1.) Was the defendant Cox induced by fraud to accept the bill?—Answer: Yes. (2.) Did the plaintiffs give value for the bill?—Answer: Yes. (3.) Did they give it in good faith?—Answer: No. And upon those findings judgment was given. Under s. 90 of the Bills of Exchange Act, 1882, a thing is deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly, whether it is done negligently or not; so that the finding of the jury that the plaintiffs did not give value in good faith means that they did not give it in fact honestly within the meaning of the section. The appeal of the plaintiffs is based upon this—that the verdict of the jury was utterly unreasonable, and that not only was there no evidence whatever of absence of good faith on the part of the plaintiffs, but that all the evidence adduced at the trial tended in exactly the opposite direction, and their case is that they proved to demonstration that they acted in good faith, and they ask this Court to say that, having regard to the evidence adduced at the trial, they acted in good faith notwithstanding the finding of the jury.

Now the facts leading up to this transaction are very simple. [His Lordship referred to the facts and to the evidence given at the

(1) 17 Q. B. D. 603.

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trial, observing that no fact of any kind was elicited at the trial to throw any doubt on the good faith of the plaintiffs. He continued :] Upon those facts the plaintiffs come to this Court and ask for judgment. Counsel for the defendant Cox says that the most this Court can do is to grant a new trial, and that however unreasonable the verdict may be, however clear the facts are, the defendant Cox is entitled to say the only thing by which he is bound is the verdict of the jury. I put this to him : Assuming the verdict was utterly unreasonable having regard to the evidence, such as no reasonable men could possibly have given, what is the proper course for this Court to adopt ? His answer was to grant a new trial. Then suppose the same process continued, as it must continue, it must go on, if necessary, ad infinitum, because all the Court can do is to direct a new trial and not to draw any inference of fact. In my opinion that is not the law, and although the Court ought to be exceedingly careful in interfering with the verdict of a jury, and still more so in giving a decision contrary to the finding of a jury, yet where it is manifest that all the facts have been ascertained, and that there is only one verdict that can be reasonably given, in my opinion it is the duty of this Court to draw the inference and to decide according to the rights of the parties, and the Court is not confined to sending the case for a new trial. That was the result of *Paquin, Ld.* v. *Beauclerk* (1) in the House of Lords, where *Millar* v. *Toulmin* (2) was referred to. It was a case in which a married woman had dealt with a milliner and had incurred a bill. She had given her name as Mrs. Holden, as she then was, and was debited in the books of Paquin, Limited, with the amount claimed. By s. 1 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), "Every contract hereafter entered into by a married woman, otherwise than as agent, (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract . . . ." The plaintiffs sued the lady and asked for judgment on the ground that the contract was to be deemed to be a contract entered into by her with respect to and to bind her separate property. The question the

(1) [1906] A. C. 148. (2) 17 Q. B. D. 603.

House of Lords had to consider was whether she had not entered into the contract as agent for her husband, because if so it was within the language of the exclusion. Lord Loreburn, after referring to *Millar* v. *Toulmin* (1) and *Allcock* v. *Hall* (2), said (3): "In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value. In the present case I think the Court of Appeal came to a sound conclusion. The only decisive question was whether the defendant made this contract as agent for her husband. Or, to put the same thing in other words, had she his authority, express or implied? In my opinion the evidence, which was uncontradicted and not impugned by cross-examination, leaves it beyond reasonable doubt that she did act with his authority. There was no evidence the other way. That is sufficient to dispose of her case." They therefore considered the matter and drew an inference of fact that the evidence established that the wife acted with her husband's authority. Lord Macnaghten put the case in this way (4): "The only question, as it seems to me, is whether the contract was entered into by the lady 'otherwise than as agent.' That is a question of fact. Unless the affirmative is shewn the Act does not apply. In the present case, inasmuch as it has been proved"—he is there, of course, referring to the evidence and the inference that he drew from the evidence—"that the lady had her husband's express authority to act as his agent and did so act, and it is not suggested that there was any misrepresentation on her part, I think the view of the Court of Appeal is right. No jury, I think, could properly have come to any other conclusion on the evidence."

(1) 17 Q. B. D. 603; (1887) 12 App. Cas. 746.
(2) [1891] 1 Q. B. 444.
(3) [1906] A. C. 161.
(4) [1906] A. C. 164.

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Now this is a course that ought only to be followed in clear cases. *Millar* v. *Toulmin* (1) was a case in which there was substantial evidence each way, as appears from the conflicting judicial decisions on the evidence in the various Courts through which the case proceeded up to the House of Lords, and therefore the Court of Appeal were not entitled to substitute what was in fact their verdict for the verdict of the jury. But where the evidence is such that only one conclusion can properly be drawn from it, then, in my opinion, this Court is bound to draw that conclusion and to enter judgment accordingly.

In the present case, when the evidence is looked at carefully, it is manifest that the plaintiffs acted with transparent honesty and good faith from beginning to end. There is no motive for any misfeasance to be suggested; there is no motive for wrong-doing. The whole of their interest in the transaction was 6 per cent. on the 300*l.* they had advanced as a temporary loan; their loan was to be repaid with 6 per cent. interest. When the facts are carefully considered, in my opinion there is only one conclusion that any reasonable body of men can possibly draw from the facts—that is, that the plaintiffs were acting in perfect honesty and in good faith. It has not been suggested that any further evidence can be obtained, nor has it been suggested that the whole of the facts of the transaction from beginning to end were not before the jury.

In my opinion the only proper course that this Court can take is to enter judgment for the plaintiffs, notwithstanding the finding of the jury on the last of the three questions.

BANKES L.J. I agree. The only really serious question in this appeal is whether this Court has jurisdiction under Order LVIII., r. 4, to enter judgment for the appellants in spite of the verdict of the jury.

I agree that the circumstances of this case are somewhat exceptional, but I entertain no doubt whatever that this Court has the power and ought to exercise it in this case. I need only refer very briefly to what seems to me to be material. [The Lord Justice referred to the evidence and continued:]

That is really a summary of the whole of the material evidence

(1) 17 Q. B. D. 603; 12 App. Cas. 746.

which has to be considered upon this point of view, and Mr. Pitman urges that the onus being upon the plaintiffs of satisfying the jury that Mr. Welch acted in good faith, they failed to satisfy them and the matter must go for a new trial and another jury must be asked to say what they think about it. In the first place I refuse to believe that the jury were so wanting in good sense and good feeling that they refused to believe Mr. Welch. I am satisfied in my own mind, and I think I am entitled to draw this inference, that what the jury did was to think that if they answered this question in the way they did they would relieve this young man of a very onerous obligation, and that they would do it at little or no expense to the plaintiffs' pocket because the value of this bill was practically nothing. I do not accept the view that the jury refused to believe Mr. Welch. I go further and say that if the jury did refuse to believe Mr. Welch they refused to believe him without the slightest justification. In these circumstances, the only possible inference which can be drawn, however many times this case is sent to be retried upon the same materials (I am assuming, of course, that the case, if it goes back to be tried, must be tried on the same materials), being that the plaintiffs acted in good faith can it be reasonable to suggest that however many times a jury take the same view as this jury, the case must be sent back again for retrial? In my opinion this Court has jurisdiction to act under r. 4 of Order LVIII., and I think that Phillimore L.J. in *Skeate* v. *Slaters, Ld.* (1) exactly meets this point in a passage in his judgment where he says: "The result, I think, is that the cases lay down that when the Court, to which the motion for new trial is made, sees that the verdict was wrong; and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so toties quoties, and at once give judgment." I think that exactly applies to this case, although I agree the rule is more often applied in cases where judgment is entered for a defendant than for a plaintiff. Still I believe the jurisdiction exists and ought to be exercised in this case.

(1) [1914] 2 K. B. 429, 446.

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EVE J. I agree. In my opinion no evidence was forthcoming to justify the verdict of the jury, and I agree with the conclusion at which the learned judge arrived at the trial, and the view which has been arrived at in this Court, that upon the evidence no reasonable men could find a verdict for the defendant. This consequence is involved—that as often as a jury return that verdict, so often must the case be sent back to be retried. In this position it must be obvious that this Court ought in the interest of all parties to avoid these consequences if it can do so without departing from any authority binding upon it. I think it can. Indeed, I think the cases which have already been referred to in the course of the judgments are authorities for the proposition that this Court may enter judgment in cases where all the available evidence was before the Court below and where this Court comes to the conclusion that no jury could properly find a different verdict.

Appeal allowed, and judgment entered for the plaintiffs for 1000*l. with interest thereon and costs.*

Solicitors: *Elvy Robb & Welch; Oldman, Cornwall & Wood Roberts.*

W. I. C.

[COURT OF CRIMINAL APPEAL.]

1918
March 11.

THE KING *v.* DE MUNCK.

Criminal Law—Procuration—"Common Prostitute"—Acts of Lewdness —Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 2, *sub-s.* 2.

The term "common prostitute" in s. 2, sub-s. 2, of the Criminal Law Amendment Act, 1885, includes a woman who offers her body commonly for acts of lewdness for payment, although there is no act, or offer of an act, of ordinary sexual connection.

APPEAL against conviction.

The appellant was indicted at the Central Criminal Court. The first four counts of the indictment charged the appellant under s. 2, sub-s. 2, of the Criminal Law Amendment Act, 1885, with attempting to procure Kathleen de Munck, the appellant's daughter, to become a common prostitute. Counts 5 to 8 charged the appellant with aiding and abetting prostitution, contrary to the provisions of the Vagrancy Act, 1898, as amended by s. 7 of the Criminal Law Amendment Act, 1912, the particulars alleged being that, for the purposes of gain, the appellant exercised control, direction, or influence over the movements of a prostitute, to wit, Kathleen de Munck, in such a manner as to show that the appellant was aiding, abetting, or compelling her prostitution. Counts 9 to 12 charged the appellant under s. 17 of the Children Act, 1908, with causing or encouraging the prostitution of Kathleen de Munck, a girl under sixteen years of age, of whom the appellant had the custody, charge or care. The offences were alleged to have been committed between May 1, 1917, and November 15, 1917, and on certain specified days between those dates.

The evidence for the prosecution showed that on various occasions between the dates alleged the appellant and her daughter, who was fourteen years old, had been seen accosting men in the street in the West End of London, and that the daughter had been seen doing so when not accompanied by the appellant, that the daughter had taken men to the house where the appellant was living, and

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had been left by the appellant alone with a man in a room furnished as a bedroom. Medical evidence was given for the defence which proved that at the date of the trial the daughter was virgo intacta. It was contended by counsel for the defence that as the girl was a virgin, and the offences were alleged to have been committed over a period of five months, the appellant could not be found guilty. The learned commissioner (Judge Atherley Jones, K.C.) who tried the case directed the jury that the term "prostitute" was not necessarily confined to a woman who for gain offered her body for natural sexual intercourse, and that if the jury came to the conclusion that the appellant procured her daughter to offer her body for gain for the gratification of the sexual passions of any man by any unnatural and abnormal act of indecency, they would be justified in finding her guilty.

The jury convicted the appellant on all the counts of the indictment, and she was sentenced to imprisonment for fifteen months with hard labour.

E. J. Purchase, for the appellant. This appeal involves the question of the meaning of the words "prostitute" and "prostitution" in the statutes under which the appellant was indicted. The definition of a prostitute in the Oxford English Dictionary is, first, a woman "who offers her body to indiscriminate sexual intercourse, especially for hire—a common harlot"; and, secondly, "a person given over to infamous practices of any kind." It cannot be disputed that these statutes are dealing with some form of sexual offence, and, therefore, when a word is used which has a very wide meaning as well as a narrower one the only safe construction is to give the word the narrower meaning usually attributed to it, namely, a woman who offers her body for gain for the purpose of natural sexual intercourse. The fact that the girl was virgo intacta after leading the life described by the witnesses for the prosecution showed that the appellant had not endeavoured to procure her daughter to have sexual intercourse, and although the object may have been the commission of acts of indecency, that did not render the appellant guilty of the offences charged. *Rex* v. *Jacobs* (1) is

(1) (1817) Russ. & R. 331.

an illustration of the strictness with which the criminal law as to sexual offences is applied.

Percival Clarke, for the Crown. Prostitution is not confined to acts of natural sexual intercourse, but includes any acts of lewdness. [He referred to Mead and Bodkin's Criminal Law Amendment Act, 1885, 4th ed., p. 121.]

The judgment of the COURT (Darling, Lord Coleridge, and Salter JJ.) was delivered by

DARLING J. In this case the appellant was convicted under an indictment containing twelve counts framed under three different Acts of Parliament, but the only question which the Court has to determine is whether that which the appellant did, or attempted to procure her daughter to do, amounts to procuring or attempting to procure her daughter to become a common prostitute. The evidence shows that during a period of some months the appellant permitted her daughter to bring men to the appellant's house and to be in private with them in circumstances which would lead to the inference that she had repeatedly had sexual intercourse with them; but it was conclusively proved that the girl was virgo intacta in the limited sense that she had never had ordinary sexual intercourse with any man.

We have to decide what is a prostitute or what is prostitution. The argument advanced on behalf of the appellant practically was that the offering by a woman of her body for the gratification of the sexual passions of men, even if it is done as a regular trade, indiscriminately and for gain, is not prostitution unless the men's passions are gratified by the act of sexual connection and not otherwise. We have come to the conclusion that that contention is not well founded. It was advanced before the learned commissioner at the Central Criminal Court and he laid down the law practically as we are now going to lay it down, and we, therefore, uphold his decision. The Court is of opinion that the term "common prostitute" in the statute is not limited so as to mean only one who permits acts of lewdness with all and sundry, or with such as hire her, when such acts are in the nature of ordinary sexual connection. We are of opinion that prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in

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return. There was ample evidence that this girl did that, and that the appellant knew what she was doing and procured her for this particular conduct.

The appeal will therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitors for prosecution: *Wontner & Sons.*

F. O. R.

1918

March 14, 20.

REVILL *v.* BETHELL.

Emergency Legislation—Lessor and Lessee—Assignment of Lease — Assignee becoming Soldier—Application to Court to determine Tenancy—Conditions on which Tenancy may be determined—Relief from Arrears of Rent and past Breaches of Covenant—Power of Court to adjudicate upon Liabilities of Lessee under Lease—Courts (Emergency Powers) (Amendment) Act, 1916 (6 & 7 *Geo.* 5, *c.* 13), *s.* 2.

By s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916, "Any officer or man of His Majesty's forces who is the tenant of any premises under a tenancy from year to year, or for any longer period, may apply to the county court . . . . for leave to determine such tenancy, and, upon any such application being made, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order authorise the applicant to determine the tenancy by such notice and upon such conditions as the court thinks fit, and thereupon such tenancy may, notwithstanding any provision in the tenancy agreement or lease, be determined accordingly."

A lease of certain premises contained the usual covenants by the lessee to pay the rent and to keep the premises in repair. In 1910 the lessee, with the consent of the lessor, assigned the lease, the assignment containing a covenant by the assignee to indemnify the lessee against the covenants of the lease. The assignee joined His Majesty's forces, and on July 7, 1917, applied to the county court, under the above section, for leave to determine the tenancy. Notice of the application was given to the lessor and to the lessee. The county court judge on September 25, 1917, made an order that the applicant be at liberty to determine the tenancy of the premises as on June 24, 1917, upon payment to the lessor of the rent due in respect of the premises to March 25, 1917, and upon the further condition that no action should be brought by any

person or persons against any person or persons in respect of the breach of any covenant contained in either the lease or the assignment, the lessor to have liberty to sue the lessee for the quarter's rent from March 25 to June 24, 1917, if he thought he had a right to do so. On October 5, 1917, the tenant gave notice in the terms of the order determining the tenancy. The lessor appealed on the ground that the county court judge had no jurisdiction to relieve the lessee of his liabilities under the lease, or to relieve the applicant from his liability to pay arrears of rent and from his liability in respect of past breaches of covenant :—

Held, that the county court judge was empowered by s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916, to adjudicate upon the rights and liabilities of all parties under the lease, including both the lessee and the tenant ; and that the conditions upon which the Court could order the tenancy to be determined were not limited to conditions onerous to the tenant, but included, if the circumstances in the opinion of the county court judge justified such an order, relief from arrears of rent and past breaches of covenant.

APPEAL from Bow County Court.

In November, 1904, a lease of certain premises in East Ham was granted by Sir John Bethell to William John Tiltman for a term of eighteen years from December 25, 1904. The lease contained the usual covenants on the part of the lessee to pay the rent and taxes and to repair, and not to underlet or assign the premises without the consent in writing of the lessor. The lessee also covenanted that the premises should not be used except for the business of a chemist. In 1910 Tiltman, with the consent of the lessor, assigned the lease to one George Revill. The assignment contained a covenant by Revill to indemnify Tiltman against the covenants contained in the lease. Revill in October, 1916, joined His Majesty's forces, and on July 7, 1917, after the failure of negotiations with the lessor for the substitution of a new tenant, who was not a chemist, he applied to the county court under s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916, for leave to determine the tenancy. Notice of the application was given to the lessor and to Tiltman as lessee.

The county court judge on September 25, 1917, made an order that the applicant be at liberty to determine the tenancy of the premises as on June 24, 1917, upon giving to the lessor notice in writing of his intention to determine the same, and upon payment

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by the applicant to the lessor of the rent due in respect of the premises to March 25, 1917, and upon the further condition that no action should be brought by any person or persons against any person or persons in respect of the breach of any covenants contained in either the lease or the assignment, the lessor to have liberty to sue Tiltman for the quarter's rent from March 25, 1917, to June 24, 1917, if he thought he had a right to do so.

Revill on October 5, 1917, gave notice determining the tenancy in the terms of the order.

The lessor appealed.

Hogg, K.C., and *Cartwright Sharp*, for the lessor. The county court judge had no jurisdiction under s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916, to relieve the applicant from his liability to pay arrears of rent or in respect of breaches of covenant prior to the termination of the lease. Under the Act the county court judge could either unconditionally authorize the applicant to determine the tenancy or authorize him to do so subject to conditions to be performed by him, but the judge had no jurisdiction to order as a condition of the tenancy being determined that the landlord should pay a sum of money, which is what in effect he has done, by relieving the applicant from liability in respect of arrears of rent and past breaches of covenants. The most a Court can do is to order the tenancy to be determined unconditionally. Further, the county court judge had no jurisdiction on this application to relieve the lessee Tiltman from his liabilities under the lease. In construing an Act of Parliament it is necessary to look at the mischief which the Act was intended to remedy, and the words of the statute, although capable of a wider meaning, must be limited to meeting the mischief which the Act was intended to meet. This Act was passed in order to relieve persons joining His Majesty's forces from civil liabilities, and no other persons are affected by the Act. The words "determine such tenancy" in s. 2 mean determine as between lessor and tenant only. Swinfen Eady L.J. in *Tozer* v. *Viola* (1) expressed the opinion that the liability of lessor and lessee as between themselves continued notwithstanding the termination of the tenancy. It was held

(1) [1918] 1 Ch. 75, 87.

by the House of Lords in *Hill* v. *East and West India Dock Co.* (1) that where the assignee of a lease became bankrupt and his trustee had disclaimed the lease under s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the lessee, notwithstanding the disclaimer, remained liable upon his covenant to pay rent to the lessor. The principle of that case applies here. The effect of a surrender of a lease was discussed by the House of Lords in *Attorney-General* v. *Cox* (2), and it was held that where a lease containing a personal covenant for the payment of rent is surrendered the personal covenant is independent of the estate in the property, and, as to rent previously due, is not affected by the surrender. The order of the county court judge made on September 25, 1917, purported to authorize the applicant to give a notice determining the tenancy as on June 24. That he clearly had no power to do.

Giveen, for the lessee, Tiltman. The county court judge has power under the Act to determine the rights and liabilities of all parties to the lease, including the lessee, and not merely the rights and liabilities of the tenant who has become a soldier, and he has power to determine the tenancy upon conditions as between the lessor and lessee as well as between the soldier tenant and the landlord. The Act expressly provides that "the Court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order authorize the applicant to determine the tenancy by such notice and upon such conditions as the Court thinks fit." Warrington L.J. pointed out in *Tozer* v. *Viola* (3) that "it is not merely that the Court is to be able to impose such terms upon the soldier as it thinks fit, but the Court may make the order upon such conditions as it thinks fit." The decision in that case is not in favour of the present appellant, because both Warrington L.J. and Scrutton L.J. laid stress upon the fact that the county court judge had power to make an order authorizing the termination of the tenancy on such conditions as in his absolute discretion he might think fit. If the argument for the appellant were correct it would only have been necessary for the Act to say that the county court judge had power to make an order determining the tenancy. The Act was passed in a time

(1) (1884) 9 App. Cas. 448. (2) (1850) 3 H. L. C. 240.
(3) [1918] 1 Ch. 88.

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of national peril and was intended to deal with the position of all parties, otherwise the extraordinary result might follow that if both the lessee and assignee of premises became soldiers the county court judge could relieve the assignee in respect of his liabilities but not the lessee. *Hill* v. *East and West India Dock Co.* (1) turned on s. 23 of the Bankruptcy Act, 1869. That section expressly provided that the lease should be "deemed to have been surrendered" when it was disclaimed by a trustee in bankruptcy, but there was power under that Act to vest the lease in the lessee, and the lessee could prove in the bankruptcy in respect of his right of indemnity; therefore it was possible for the Court to hold that third parties whose rights were preserved by the section were not affected by the surrender. The position under the present section is, however, entirely different, because there is no provision enabling a lessee to obtain an order vesting the lease in himself, and the lessee would not have any rights against any one, inasmuch as the liability of the soldier assignee under the assignment to indemnify the lessee would be terminated by the order of the county court judge. It was held in *Stacey* v. *Hill* (2) that where a lessee had become bankrupt and his trustee in bankruptcy had disclaimed the lease the liability of a person who had guaranteed the payment of rent was also determined. The Court has power to grant relief upon any condition it pleases, and therefore can give relief against antecedent liabilities in respect of arrears of rent and breaches of covenant. If a tenant is deprived of his means of paying arrears of rent by becoming a soldier it is only just and equitable that he should be relieved from liability for such arrears. Under this Act a free discretion is entrusted to the Court and the conditions upon which relief is granted are not based upon statutory enactment at all. Lord Loreburn pointed out in *Hyman* v. *Rose* (3) that it is one thing to decide what is the true meaning of the language in an Act of Parliament, but that it is a very different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all.

G. W. H. Jones, for the applicant Revill, adopted the argument

(1) 9 App. Cas. 448. (2) [1901] 1 K. B. 660.
(3) [1912] A. C. 623, 631.

of *Gveen*. Among " all the circumstances of the case " which it is necessary for the Court to take into consideration before granting relief is the fact that the tenant is in arrear with his rent, and the Court can give him relief against all existing obligations. Existing liabilities are not extinguished under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), but merely postponed. The Court has not relieved the applicant in the present case from all liability, but has imposed a limited liability upon him as a condition of granting him relief. It is clear from the judgment of Warrington L.J. in *Tozer* v. *Viola* (1) that the conditions upon which the Court may authorize an applicant to determine a tenancy include terms other than terms imposed upon the applicant.

Hogg, K.C., replied.

Cur. adv. vult.

1918. March 20. AVORY J. read the following judgment:—This was an application by George Revill under s. 2 of the Courts (Emergency Powers) (Amendment) Act, 1916, for leave to determine the tenancy of certain premises of which the respondent (the present appellant) was the lessor and the applicant the assignee of a lease granted by the respondent to one William Tiltman and assigned by Tiltman to the applicant. George Revill, the tenant, joined His Majesty's forces in October, 1916, and, after negotiations with the appellant for the substitution of a new tenant which failed, made his application to the county court under the said Act on July 7, 1917. The application was heard on July 13, 1917, upon notices duly given to the appellant as lessor and to Tiltman as lessee and assignor, who were respectively represented before the county court judge, and, it then appearing that the case of *Tozer* v. *Viola* (2) was pending before Astbury J. in the Chancery Division, the learned judge adjourned his decision. On September 25, 1917, an order was made by the county court judge in the terms following: [His Lordship read the order.] On October 5, 1917, Revill, the tenant, gave notice in the terms of the order determining the tenancy.

On behalf of the appellant, Mr. Hogg contended that the county court judge had no jurisdiction to make the order in those terms,

(1) [1918] 1 Ch. 88. (2) Ibid. 75.

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Avory J.

on two grounds: (1.) That he had no jurisdiction to determine on such an application the liability of the lessee (Tiltman) under the lease; (2.) that he had no jurisdiction to determine the liability of the tenant (Revill) for arrears of rent, and past breaches of covenant; and he contended that the words in s. 2 of the Act, "upon such conditions as the Court thinks fit," should be construed as limited to conditions imposed on the tenant, and to be fulfilled by him. In support of these contentions he quoted the decision of the Court of Appeal in *Tozer* v. *Viola* (1), *Hill* v. *East and West India Dock Co.* (2), and *Attorney-General* v. *Cox.* (3)

In my opinion the only point decided in the Court of Appeal in *Tozer* v. *Viola* (1) was that in a case where the order of the county court, made under this section, in terms provides that it shall not affect the respective rights and liabilities of the lessor and lessee, then those rights and liabilities are not affected, and the county court judge has power to make such an order. The case of *Hill* v. *East and West India Dock Co.* (2) was a decision under s. 23 of the Bankruptcy Act, 1869, and, although it was quoted by Swinfen Eady L.J. in *Tozer* v. *Viola* (4) as having a bearing on that particular case, I do not think that the learned Lord Justice meant to say that there was a complete analogy between the two statutes, or that the decision in *Hill's Case* (2) would prevent the making of an order such as that made in the present case. In *Attorney-General* v. *Cox* (5) it was laid down, as a general proposition of law, that the personal covenant is independent of the estate in the property, and is not affected by its surrender or determination; but the question we have to decide in this case is in what respect, and to what extent, the law has been altered by this emergency statute, the manifest object of which is to alter the existing law.

On behalf of the respondent it was contended by Mr. Jones and Mr. Giveen who appeared for the tenant (Revill) and the lessee (Tiltman) respectively, that the words of s. 2 of the Act, "the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties," empowered the Court to adjudicate upon the liabilities of the lessee

(1) [1918] 1 Ch. 84.
(2) 9 App. Cas. 448.
(3) 3 H. L. C. 240.
(4) [1918] 1 Ch. 85.
(5) 3 H. L. C. 275.

under the lease, and also the liabilities of the tenant for arrears of rent and past breaches of covenant; and they relied upon certain observations made by Warrington L.J. in the Court of Appeal in *Tozer* v. *Viola* (1) which, in my opinion, support their contention. If the county court judge is to take into consideration the position of all the parties and they are represented before him, I can see no reason why he should not adjudicate upon the rights and liabilities as between all the parties, and Mr. Hogg did not contend that the county court judge could not relieve the soldier tenant from his covenant as assignee to indemnify the original lessee against the rent and covenants contained in the lease, otherwise the relief granted to the tenant would be illusory, and the relief granted to the tenant alone might cast upon the lessee an unexpected and unjust burden. Nor do I see any reason why the conditions upon which the tenancy is to be determined should be limited to conditions onerous upon the tenant, nor why they should not include, in a case where the circumstances justify it in the opinion of the county court judge, relief from arrears of rent and past breaches of covenant. In my opinion the county court judge had jurisdiction to make the order, and the appeal should be dismissed.

In the course of the argument objection was taken to the form of the order authorizing the determination of the tenancy as from an antecedent date. As it can only be determined under the statute by notice I do not think this could properly be done, but if the other terms of the order are valid this objection appears to be one of form only, and not of substance, as the order, which would have been made in the ordinary course in July, was obviously intended to limit the liability of the lessee for rent up to June 24, 1917, and the Court was not invited to determine the appeal on this latter ground alone.

SALTER J. concurred.

Appeal dismissed.

Solicitors for lessor: *Pearce, Foster & Smith.*
Solicitors for lessee: *Gard, Lyell & Co.*
Solicitors for applicant: *Bishop & Fenton-Jones.*

(1) [1918] 1 Ch. 88, 89.

R. F. S.

1918
March 18, 26.

In re CULLWICK.

Ex parte THE LONDON SENIOR OFFICIAL RECEIVER, APPELLANT; THE OFFICIAL RECEIVER OF NOTTINGHAM COUNTY COURT, RESPONDENT.

Bankruptcy—Proof—Three Successive Bankruptcies—Right of Trustees in first and second Bankruptcies to prove in third Bankruptcy—Statute of Limitations—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 39, *sub-s.* 1.

Sect. 39, sub-s. 1, of the Bankruptcy Act, 1914, provides as follows: "In the event of a second or subsequent receiving order being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall . . . . vest in the trustee in the subsequent bankruptcy, but any unsatisfied balance of the debts provable under the last preceding bankruptcy may be proved in the subsequent bankruptcy by the trustee in the last preceding bankruptcy."

In 1899 the debtor was adjudicated bankrupt, the debts provable consisting of simple contract, specialty, and judgment debts. He had not obtained his discharge in that bankruptcy, and the unsatisfied balance of the debts amounted to 2643*l.* 13*s.* 11*d.* In 1909 he was again adjudicated bankrupt, the debts incurred by him—simple contract debts—subsequent to the first adjudication amounting to 228*l.* 17*s.* 5*d.* He had not obtained his discharge in this bankruptcy when in 1916 he was adjudicated bankrupt again. In October, 1917, the trustee in the first bankruptcy lodged a proof against the estate in the second bankruptcy for 2643*l.* 13*s.* 11*d.*, which was admitted to rank for dividend. In November, 1917, the trustee in the second bankruptcy lodged a proof against the estate in the third bankruptcy for the two sums of 2643*l.* 13*s.* 11*d.* and 228*l.* 17*s.* 5*d.* This proof was rejected by the trustee in the third bankruptcy on the ground that the claims were barred by the Statute of Limitations, and alternatively that s. 39, sub-s. 1, of the Bankruptcy Act, 1914, gave no right of proof in respect thereof:—

Held, that the proof should be admitted for the full amount as the effect of s. 39, sub-s. 1, of the Bankruptcy Act, 1914, was to give a right of proof, not to individual creditors, but to the trustee against the estate in each succeeding bankruptcy, and inasmuch

as the trustee's right to prove in those circumstances was conferred for the first time by the section no question arose as to the operation of the Statute of Limitations.

CASE stated by the county court judge of Nottingham for the opinion of the Court.

On May 24, 1899, Cullwick (hereinafter referred to as "the bankrupt") was adjudicated a bankrupt at Pembroke Dock County Court. He had not obtained his discharge in that bankruptcy (hereinafter referred to as "the first bankruptcy"). The official receiver of that Court was the trustee.

The gross amount of the debts provable in the first bankruptcy was 2646*l.* 19*s.* 4*d.*, made up as follows:—Simple contract debts, 1822*l.* 12*s.* 11*d.*; principal due under a statutory mortgage dated May 11, 1898, and an indenture of transfer of mortgage dated July 4, 1898, 737*l.* 0*s.* 2*d.*; five judgment debts amounting to 87*l.* 6*s.* 3*d.*

No dividend had been declared or paid to the creditors whose debts were provable in the first bankruptcy, and the unsatisfied balance of those debts was 2643*l.* 13*s.* 11*d.*

On July 2, 1909, the bankrupt was again adjudicated a bankrupt in the High Court, and he had not obtained his discharge in that bankruptcy (hereinafter referred to as "the second bankruptcy").

The debts incurred by the bankrupt subsequent to the first adjudication and before the receiving order in the second bankruptcy amounted to 228*l.* 17*s.* 5*d.* and were simple contract debts. No dividend had yet been declared or paid in the second bankruptcy. The Senior Official Receiver in London was the trustee in that bankruptcy.

On June 23, 1916, the bankrupt was for the third time adjudicated a bankrupt in the Nottingham County Court. This bankruptcy is hereafter referred to as "the third bankruptcy." The official receiver of the Court was the trustee.

On October 23, 1917, the trustee in the first bankruptcy lodged a proof of debt against the estate in the second bankruptcy for 2643*l.* 13*s.* 11*d.*, which was admitted to rank for dividend at that amount on October 26, 1917.

On November 21, 1917, the trustee in the second bankruptcy

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lodged a proof of debt against the estate in the third bankruptcy for the said sums of 2643*l.* 13*s.* 11*d.* and 228*l.* 17*s.* 5*d.*, making together the sum of 2872*l.* 11*s.* 4*d.*

On January 9, 1918, the trustee in the third bankruptcy rejected the last-mentioned proof on the following grounds :—

1. That the claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

2. Alternatively that the two sums of 2643*l.* 13*s.* 11*d.* and 228*l.* 17*s.* 5*d.* were respectively barred by the said statute.

3. That the said sum of 2643*l.* 13*s.* 11*d.* was not provable in this bankruptcy, and that s. 39, sub-s. 1, of the Bankruptcy Act, 1914, gave no right of proof in respect thereof.

4. That the said sum of 2643*l.* 13*s.* 11*d.* was not provable in the second bankruptcy.

5. That neither the trustee in the second bankruptcy nor the individual creditors in that bankruptcy and in the first bankruptcy had any right of proof in this bankruptcy.

On January 16, 1918, notice of motion by way of appeal from the said rejection was given by the appellant. On the motion coming before the county court the parties agreed to this case being stated.

The questions for the opinion of the Court were :—

1. Whether the Statute of Limitations (21 Jac. 1, c. 16) is applicable to a proof of debt made in a subsequent bankruptcy of a debtor by the trustee in a prior bankruptcy under s. 39, sub-s. 1, of the Bankruptcy Act, 1914, and, if so, from what date the statute runs against the trustee.

2. Whether for the purpose of the various Statutes of Limitations such a proof is to be treated as though it were in respect of a simple contract debt due to the trustee in the prior bankruptcy, or whether the Statutes of Limitations are to be applied according to the nature of the debts forming the basis of the proof.

3. Whether trustees in bankruptcies occurring before the Bankruptcy Act, 1914, came into operation are entitled to the right of proof given by s. 39, sub-s. 1, of that Act where the bankruptcy in which the proof is tendered occurs (*a*) before, (*b*) after the coming into operation of that Act.

4. Whether individual creditors whose debts are provable in

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a bankruptcy in which the debtor remains undischarged and are not barred by any Statute of Limitations can prove in a subsequent bankruptcy of the same debtor, or whether proof can only be made by the trustee in the prior bankruptcy by virtue of s. 39, sub-s. 1.

5. Whether where there are more than two bankruptcies of the same debtor the right of proof given by s. 39, sub-s. 1, against the estate in the last bankruptcy is limited to such only of the debts provable in the penultimate bankruptcy as were incurred since the date of any prior bankruptcy.

6. Whether in the circumstances set forth in this case the proof of the trustee in the second bankruptcy ought to be admitted for any and what amount, and particularly whether the said sum of 2643*l.* 13*s.* 11*d.* is provable.

Tindale Davis, for the trustees in the first and second bankruptcies. The first and second questions should be answered by saying that the Statute of Limitations has no application. Prior to s. 11, sub-s. 3, of the Bankruptcy and Deeds of Arrangement Act, 1913, now represented by s. 39, sub-s. 1, of the Bankruptcy Act, 1914, all after-acquired property in such a case as this would have passed to the trustee in the first bankruptcy: *Ex parte Ford* (1); *In re Clark* (2); and the effect of s. 39, sub-s. 1, of the Act of 1914 is to take away that right and to give to each trustee a right of proof in the subsequent bankruptcy. Some difficulty as to the operation of the Statute of Limitations no doubt arises by reason of the decision of the Court of Appeal in *In re Benzon* (3), but that has no relevancy in the present case, because, in the first place, the application there was by creditors, and, secondly, the fund in question, an appointed fund, did not pass to the trustee in bankruptcy. In the older cases it was clearly laid down that bankruptcy stopped the running of the Statute of Limitations: *Ex parte Ross* (4); *In re Crosley.* (5) The trustee's right does not arise by contract, but is a right in rem. Even assuming, however, that the Statute of Limitations can run at all, it runs only from the time when the trustee's right first came into existence, namely, from

(1) (1876) 1 Ch. D. 521.
(2) [1894] 2 Q. B. 393.
(3) [1914] 2 Ch. 68.
(4) (1827) 2 Gl. & J. 330.
(5) (1887) 35 Ch. D. 266, 270.

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the date when the new right was given by the Act of 1914, and as the right arises on a statute, the period is twenty years: *Cork and Bandon Ry. Co.* v. *Goode.* (1)

Both parts of the third question should be answered in the affirmative. Sect. 168, sub-s. 2, of the Act of 1914 provides that the Act shall apply to proceedings under the Bankruptcy Acts, 1883 to 1913, pending at the commencement of the Act of 1914, as if they had been commenced under that Act. In this case the two earlier bankruptcies were subsequent to the Act of 1883. The trustee in the second bankruptcy has clearly been given, by s. 39, sub-s. 1, of the Act of 1914, a right of proof against the estate in the third bankruptcy. The difficulty is with regard to the right of proof by the trustee in the first bankruptcy against the trustee in the second bankruptcy, but it cannot have been intended that the trustee in the first bankruptcy, who prior to the Acts of 1913 and 1914 would have been entitled to all after-acquired property, should be deprived of that right without being given a right of proof.

The fourth question has been inserted because of an observation of James L.J. in *Ex parte Watson* (2) to the effect that the creditors under a prior bankruptcy can come in under the second, but that is merely a dictum and is contrary to the view expressed by Warrington J. in *In re Guedalla* (3), where he said that "it is through the trustee in bankruptcy that the creditors in bankruptcy are entitled to a dividend on their debt," and moreover is not in accord with s. 7 of the Act of 1914.

The fifth question involves the same point as the third.

The sixth question merely applies the preceding questions. The answer should be that the proof in question ought to be admitted for the total sum of 2872*l.* 11*s.* 4*d.*

E. W. Hansell, for the trustee in the third bankruptcy. With regard to the first and second questions, it is essential to see what the nature of the right of proof given by s. 39, sub-s. 1, of the Act of 1914 is. It is submitted that it merely creates a new remedy in favour of the trustee as representing creditors, and does not create a new debt. A new remedy being given for the original

(1) (1853) 13 C. B. 826. (2) (1879) 12 Ch. D. 380.
(3) [1905] 2 Ch. 331, 338.

cause of action which the creditors had, but which was suspended by the bankruptcy, so far as an action was concerned, it is necessary to see whether at the time of the commencement of the Act of 1914 the Statute of Limitations had not barred their claims. A right of proof connotes a provable debt. Here the Statute of Limitations had barred the claims in question.

As to the third question, it is a well-accepted canon of construction that a retrospective effect is not to be given to a statute unless the intention that it should be so construed is expressed in clear and unambiguous language: *In re Suche & Co.* (1); *In re Pulborough School Board Election* (2); *In re Waverley Type Writer.* (3) Applying that principle of construction to s. 39, sub-s. 1, of the Act of 1914, the only right of proof given is for the "unsatisfied balance of the debts provable under the last preceding bankruptcy," that is, in this case, the second bankruptcy. Before the Act of 1914 there was no right of proof given to the trustee in the first bankruptcy against the second bankruptcy, and s. 39, sub-s. 1, has not conferred that right.

As to the fourth question, assuming that the observation of James L.J. in *Ex parte Watson* (4) is nothing more than a dictum, it must be admitted that the right of proof is by the trustee, and not by the creditors.

The fifth question should be answered by saying that the right of proof given by s. 39, sub-s. 1, in the third bankruptcy is limited to those debts in the second bankruptcy as were incurred since the date of the first bankruptcy.

Tindale Davis, in reply, referred to s. 65 of the Bankruptcy Act, 1914.

Cur. adv. vult.

March 26. HORRIDGE J. read the following judgment:—This was a special case stated by the judge of the county court of Nottinghamshire holden at Nottingham for the opinion of the High Court.

The facts out of which the questions argued before me have arisen are as follows: On May 24, 1899, the bankrupt was adjudicated a bankrupt in the county court of Pembrokeshire holden

(1) (1875) 1 Ch. D. 48.
(2) [1894] 1 Q. B. 725.
(3) [1898] 1 Ch. 699.
(4) 12 Ch. D. 380.

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at Pembroke Dock. He has not obtained his discharge, and the official receiver is now the trustee. On July 2, 1909, the bankrupt was again adjudicated a bankrupt in the High Court. He has not obtained his discharge, and the Senior Official Receiver in London is the trustee. On June 23, 1916, a receiving order was made against the bankrupt, and he was on that date for the third time adjudicated a bankrupt in the county court of Nottinghamshire holden at Nottingham. He has not obtained his discharge, and the official receiver of the last-named Court is the trustee.

On April 1, 1914, the Bankruptcy and Deeds of Arrangement Act, 1913, came into operation, and s. 11, sub-s. 3, of that Act (which has now become s. 39 of the Bankruptcy Act, 1914) first became law. By s. 39 of the Bankruptcy Act, 1914, omitting words not applicable to this case, it is provided as follows: "In the event of a second or subsequent receiving order being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall . . . . vest in the trustee in the subsequent bankruptcy, but any unsatisfied balance of the debts provable under the last preceding bankruptcy may be proved in the subsequent bankruptcy by the trustee in the last preceding bankruptcy."

On October 23, 1917, the trustee in the first bankruptcy lodged in the second bankruptcy a proof for 2643*l.* 13*s.* 11*d.*, purporting to be the unsatisfied balance of the debts provable in the first bankruptcy, and such proof was on October 26, 1917, admitted to rank for dividend. On November 21, 1917, the trustee in the second bankruptcy lodged in the third bankruptcy a proof for this 2643*l.* 13*s.* 11*d.* and for 228*l.* 17*s.* 5*d.*, the unsatisfied balance of other debts provable in the second bankruptcy.

Sect. 11, sub-s. 3, of the Bankruptcy and Deeds of Arrangement Act, 1913, embodied in s. 39 of the Bankruptcy Act, 1914, altered the law as then existing. The assets received in both the second and third bankruptcies would, prior to such section, have belonged to the trustee in the first bankruptcy—*In re Clurk* (1)—unless the trustee in the first bankruptcy had stood by with knowledge

(1) [1894] 2 Q. B. 393.

in such a manner as to prevent him from asserting his claim: *Troughton* v. *Gitley*. (1)

It was argued before me that the trustee in the first bankruptcy when sending in the proof in the second bankruptcy and the trustee in the second bankruptcy when sending in the proof in the third bankruptcy were merely representing creditors, and that I must inquire into the individual debts of the creditors in order to ascertain whether or not they were simple contract, judgment, or specialty debts so as to find out whether any Statute of Limitations would be an answer to any claim upon them. In my view the operation of s. 39 of the Bankruptcy Act, 1914, conferred in this case the right of proof for the first time when the receiving order was made on the third bankruptcy petition. It is a right of proof given to the trustee and not to individual creditors, and, inasmuch as his right did not accrue till the date of the last receiving order, no question as to the operation of the Statute of Limitations can arise in this case. When once the right of proof exists against the estate the Statute of Limitations does not run in favour of the trustee of such estate—see *Ex parte Ross* (2)—and the creditors can, subject to the provisions of s. 65 of the Bankruptcy Act, 1914, prove their debts at any time. I think it quite clear on the wording of s. 39 that it must apply to the receiving order in the third bankruptcy which was made after the coming into operation of the section, and must therefore vest in the trustee under that bankruptcy any undistributed property acquired since the second bankruptcy, and the trustee in the second bankruptcy would clearly have the right to prove for the debts amounting to 228*l.* 17*s.* 5*d.*, being debts other than the liability arising out of the admission of the proof of the trustee in the first bankruptcy.

It was contended before me that even if the trustee in the second bankruptcy was affected by s. 39, that section had no relation to the position as between the first and second bankruptcies; in other words, that it would not, as against the trustee in the first bankruptcy, vest in the trustee in the second bankruptcy any undistributed subsequently acquired assets in the first, and would give to the trustee in the first bankruptcy no right of proof in the second bankruptcy. It was argued that the general rule was,

(1) (1766) Amb. 630.

(2) 2 Gl. & J. 330.

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where the Legislature altered the rights of parties, such alteration, unless the intention to do so appeared in plain and unambiguous language, did not affect retrospectively the rights of parties: see per Jessel M.R. in *In re Suche & Co.* (1); *Young* v. *Adams* (2), quoting with approval the language of Erle C.J. in *Midland Ry. Co.* v. *Pye.* (3) I think the Bankruptcy Act, 1914, s. 168, sub-s. 2, clearly shows that the provisions of that Act, including s. 39, do apply to pending bankruptcies, and I cannot see why it should not apply equally as between the first and second bankruptcies as it must, to give it any reasonable effect, apply as between the second and third bankruptcies, the last one occurring after the coming into operation of the Act. If the section does not apply as between the first and second bankruptcies, the trustee in the first bankruptcy would, in a case like the present where there are three bankruptcies, be deprived by the section of the assets acquired subsequently to the second bankruptcy to which under the old law he would have been entitled and would be given no corresponding right of proof. I think the effect of the section is to transfer to each succeeding bankruptcy the undistributed assets of the earlier bankruptcy subsequently acquired and to give a corresponding right of proof.

Having regard to the opinion I have expressed, the answers to the questions set out in the case will be as follows:—(1.) No. (2.) I do not think any question of the Statute of Limitations arises, inasmuch as s. 39, in my view, gives a right of proof, and, that right of proof having been given, it is not affected by the Statute of Limitations. (3.) (*a*) Yes.; (*b*) Yes. (4.) Inasmuch as the right of proof is expressly given by s. 39 to the trustee, no other person can prove. (5.) No. (6.) The proof of the trustee in the second bankruptcy ought to be admitted for the total amount of 2872*l.* 11*s.* 4*d.*, including therein the said sum of 2643*l.* 13*s.* 11*d.*

Solicitors for trustees in first and second bankruptcies: *Tarry, Sherlock & King.*

Solicitor for trustee in third bankruptcy: *Solicitor to Board of Trade.*

(1) 1 Ch. D. 48, 50.
(2) [1898] A. C. 469, 476.
(3) (1861) 10 C. B. (N.S.) 179, 191.

J. S. H.

In re An Arbitration between THOMSON & CO. and BROCKLEBANK, LIMITED.

1918
Feb. 14.

Shipping—Charterparty—Guarantee by Shipowners to place specified Number of Tons of Dead-weight Cargo Capacity at Charterers' Disposal—Portion of Dead-weight Capacity taken up by Dunnage—Whether to be taken into Account in calculating pro rata Reduction of Freight.

By a charterparty it was provided that a steamship described as of about the cubic capacity for cargo of 300,000 feet bale space and of 5600 tons dead-weight cargo capacity as per builders' plan should proceed from Singapore to Calcutta and there load a full and complete cargo of unobjectionable merchandise not exceeding what she could reasonably stow and carry and proceed to certain ports. The vessel's holds were to be sufficiently ventilated as customary, and all requisite mats and dunnage were to be found by the steamer. By a guarantee contained in the charterparty the owners guaranteed to place 5600 tons dead-weight cargo capacity and 300,000 cubic feet bale space as per builders' plan at disposal of charterers. If the dead-weight or bale space placed at charterers' disposal were less than the above, then the lump sum freight was to be reduced pro rata. The charterers did, in fact, load a cargo on board the ship of a kind contemplated by the charterparty, but the dead-weight cargo capacity placed at their disposal was, owing to various causes, not in any way attributable to the charterers, less than 5600 tons, and was occupied to the extent of 32 tons by dunnage provided and used by the shipowners in stowing the cargo of the ship, and by reason thereof cargo to the extent of 32 tons which the charterers were ready to ship remained unshipped. The dunnage was necessary to enable the shipowners to fulfil their obligations under the charterparty to properly stow and ventilate the cargo in the ship, and the only question which arose was whether or not the lump sum for freight ought to be reduced in respect of the 32 tons :—

Held, that in the absence of special circumstances the shipowners' guarantee was a guarantee of the abstract lifting capacity of the ship. The shipowners were therefore entitled to the lump sum freight without any deduction in respect of the 32 tons.

Award stated by an umpire in the form of a special case.

By a charterparty dated December 22, 1916, entered into by Brocklebank, Limited, as charterers and Thomson & Co. as owners of the steamship *Benledi*, therein described amongst other things

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as of about the cubic capacity for cargo of 300,000 feet bale space, excluding peaks and lazarette, and of 5600 tons dead-weight cargo capacity as per builders' plan, it was provided by clause 1 that the steamer should proceed from Singapore to Calcutta and there load in a customary manner as ordered by the charterers or their agents a full and complete cargo of unobjectionable merchandise, which the charterers bound themselves to ship, not exceeding what she could reasonably stow or carry over and above her tackle, apparels, provisions, coals, and furniture, and being so loaded should proceed to her specified port or ports and deliver the same on being paid freight at a lump sum of 78,000*l.* if to two ports, 500*l.* less if to one port only. The clause was continued by writing in the margin thereof as follows: "Owners guarantee to place 5600 tons dead-weight cargo capacity and 300,000 cubic feet (bale space), as per builders' plan, at disposal of charterers. If the dead-weight or bale space placed at charterers' disposal be less than the above, then the lump sum is to be reduced pro rata."

Clause 2 provided (inter alia) that nothing therein should exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage or insufficient dunnage or ventilation.

Clause 13 provided that the vessel's holds were to be sufficiently ventilated as customary, and that all requisite mats and dunnage were to be found by the steamer.

The steamer duly arrived in Calcutta, and the charterers were at all times ready to ship 5600 tons dead-weight of cargo of unobjectionable merchandise.

The dead-weight cargo capacity in fact placed at the charterers' disposal by the shipowners was, owing to various causes not in any way attributable to the charterers, less than 5600 tons, and was occupied to the extent of 32 tons by dunnage provided and used by the shipowners in stowing the cargo shipped, and by reason thereof cargo to the extent of 32 tons which the charterers were ready to ship remained unshipped. The cargo shipped was of the description contemplated by the charterparty.

The dunnage in question was necessary to enable the shipowners to fulfil their obligation under the charterparty to properly stow and ventilate the cargo in fact shipped.

The only dispute between the parties and submitted to the determination of the umpire was whether the 32 tons of dead-weight so taken up should be taken into account in calculating the pro rata reduction in the lump sum of 78,000*l.*

The shipowners contended that on the true construction of the charterparty, and guarantee therein, inasmuch as the amount of dunnage depended on the nature of the cargo, which within the limits of the charterparty was in the discretion of the charterers, the 32 tons of dunnage represented to the extent thereof dead-weight cargo capacity placed at the disposal of the charterers by them, and that, although the dead-weight placed by them at the disposal of the charterers was in fact less than 5600 tons, the umpire could not in law take into account the tonnage taken up by dunnage for the purpose of calculating and allowing a pro rata reduction in the lump sum of 78,000*l.* in respect thereof.

The charterers contended that the dead-weight placed at their disposal should be calculated on the dead-weight tonnage in fact placed at their disposal and available for cargo shipped by them, and that the 32 tons taken up by dunnage should be excluded from the calculation, and that inasmuch as the cargo shipped by them was such as was contemplated by the charterparty, and inasmuch as the dead-weight placed at their disposal for the cargo by the shipowners was in fact less than 5600 tons, they were entitled to a pro rata reduction in respect of the 32 tons of dead-weight so taken up by the 32 tons of dunnage.

The question for the opinion of the Court was whether upon the terms of the charterparty and guarantee in law it was open to the umpire to exclude the 32 tons dead-weight taken up by the 32 tons of dunnage from the calculation of the dead-weight cargo capacity placed at the disposal of the charterers by the shipowners, and under the guarantee to reduce the lump sum freight pro rata by reason thereof.

If the Court should be of opinion in the affirmative, the umpire awarded that the shipowners were only entitled to the lump sum freight subject to a pro rata reduction in respect of the 32 tons. If the Court should be of opinion in the negative, he awarded that the shipowners were entitled to the lump sum freight without any reduction in respect of the 32 tons.

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Sir Robert Aske, for the shipowners. The charterers are not entitled to any deduction from the lump sum freight. Under the charterparty the charterers reserve to themselves the right to ship any cargo of a nature which is unobjectionable. They might ship a cargo requiring a very large or a very small quantity of dunnage or no dunnage at all. The charterers reserve all those matters to themselves under the charterparty. They protect themselves, not by binding the shipowners to carry a cargo of a specific description, but by the guarantee of a certain cargo capacity. The test is the abstract lifting capacity of the ship. The owners tendered a ship which would carry 5600 tons. At the time of the tender of the ship the owners did not know, nor was it any concern of theirs, what kind of cargo the charterers were going to put on board. *Millar & Co.* v. *Owners of S.S. Freden* (1) is a stronger case than the present, because there the cargo was specified. That decision is in favour of the shipowners in the present case. *Carnegie* v. *Conner* (2) is nearest to the present case, but *Mackill* v. *Wright* (3) was not cited.

Stuart Bevan, for the charterers. The contention on behalf of the shipowners involves the proposition that cargo includes dunnage. "Capacity" means capacity for cargo. The charterers were not concerned with the dunnage. By the express words of the charterparty the shipowners were liable for bad stowage. The shipowners are under an obligation to reserve for the dunnage the space it requires. They must provide a cargo capacity of 5600 tons, and if they fail to do this they must show that the cargo shipped was of such an exceptional nature that the fault is that of the charterers. In the present case there is no finding that the cargo was other than an average one. The judgment of Lord Macnaghten in *Mackill* v. *Wright* (3) is applicable to the present case. The guarantee is one as to the carrying capacity of the ship with an ordinary cargo. The judgment of Lord Macnaghten in *Mackill* v. *Wright* (3) is not weakened by *Millar & Co.* v. *Owners of S.S. Freden* (1), which is quite inapplicable to the present case. There the guarantee dealt with the ship's carrying capacity.

(1) [1917] 2 K. B. 657; ante, p. 611.
(2) (1889) 24 Q. B. D. 45.
(3) (1888) 14 App. Cas. 106.

The guarantee in the present case deals with the ship's cargo capacity.

ATKIN J. having stated the facts continued: The authorities show that in the absence of express words in the charterparty or the guarantee by which it would be otherwise construed a guarantee in these terms is a guarantee of what Rowlatt J. in *Millar & Co.* v. *Owners of S.S. Freden* (1) described as the abstract lifting capacity of the ship. In *Mackill* v. *Wright* (2) there was a charterparty which provided that the vessel should load all such goods and merchandise as the charterers should tender alongside for shipment, not exceeding what she could reasonably stow and carry, and there was a guarantee by the owners that the vessel should carry not less than 2000 tons dead-weight. There was also a note on the margin of the charterparty specifying the largest pieces of the machinery which were to be included in the cargo.

The charterers tendered a cargo not in excess of 2000 tons dead-weight, but consisting of railway machinery, with pieces of machinery much more numerous than specified in the marginal note. It was held that although the cargo carried was less than the guaranteed dead-weight, yet because the charterers tendered machinery in excess of their representation they were not entitled to the benefit of the stipulation for the reduction of the freight. The value of that case is that it contains the opinion of their Lordships as to the proper construction to be placed on the guarantee. Lord Halsbury L.C., in giving judgment, said: "The guarantee is the dead-weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead-weight. But I so far agree with Lord Young that if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried, it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting, but I fail to see that the learned judge is justified in holding that this was an

(1) [1917] 2 K. B. 657; ante, p. 611. (2) 14 App. Cas. 106.

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ordinary cargo exactly such as was expected, namely coals and machinery."

Lord Watson used words of the same kind. He said: "Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure, and wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes a matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description." Therefore there may be a guarantee that the vessel will carry a particular cargo, or the guarantee may be merely in general terms. I think that in the absence of special circumstances or terms which do not exist in the present case the guarantee is limited to abstract lifting capacity. The same view is expressed in somewhat similar terms in *Carnegie* v. *Conner* (1), in which the judgments were delivered nine months after *Mackill* v. *Wright*. (2) *Mackill* v. *Wright* (2) does not appear to have been cited, but it does not appear to me that the effect of *Mackill* v. *Wright* (2) is to vary the judgments given by the learned judges in *Carnegie* v. *Conner*. (1) In that case the owners guaranteed the ship to carry at least about 90,000 cubic feet, or 1500 tons dead-weight of cargo, and Huddleston B., in giving judgment said: "As I read it, it was nothing more than a contract that the cubical contents of the space in the ship's hold available for the stowage of cargo were not less than about 90,000 cubic feet, and that 1500 tons dead-weight were capable of being put on board without sinking the ship below the proper depth." Mathew J., whose opinion on this matter is, of course, of the very highest weight, said: "I am of the same opinion. I do not think that there is any indication in this charterparty of an intention to guarantee that the ship shall carry the cargo specified in the charterparty to the amount there mentioned. The evidence which was tendered by the defendant that this ship was of an actual carrying capacity of 90,000 cubic feet, or 1500 tons, and which was objected to, appears to me to have been perfectly relevant to the issue, and ought to have been received." I therefore

(1) 24 Q. B. D. 45, 48. (2) 14 App. Cas. 106.

construe this guarantee as being a guarantee that the ship would carry 5600 tons if they were put upon her without sinking her below the proper depth.

The shipowners in a case of this kind have no knowledge as to the kind of cargo which is going to be put on board, and it is quite plain from the facts as found by the umpire that the cargo which could have been put on board her, if it had not required dunnage, might have been of a weight of 5600 tons. The charterers have a right to tender what cargo they please, and their cargo might require to be protected by dunnage or matting, and if they carried a very mixed cargo, which would be a perfectly reasonable cargo, they might require a very large number of separation boards or matting. All that is for their account. They had the space and the capacity put at their disposal for the purpose of carrying cargo. They might have filled it up with cargo of the full weight, but if they chose to carry cargo that required a certain amount of protection they could not use the cargo space placed at their disposal for the purpose of carrying the full amount of cargo they could have carried if they had not required dunnage.

In *Millar & Co.* v. *Owners of S.S. Freden* (1) Rowlatt J. said: "It could not have been contended that the guarantee was of capacity to carry 3200 tons of an average or reasonable cargo, or anything of that sort." In my judgment that statement is applicable to the present case. It appears to me that if the shipowners place at the disposal of the charterers a ship having a capacity to carry 5600 tons of cargo they have satisfied their contract, and in the present case they have done it. The matter is made quite plain in this case by the reference in the guarantee to the cubical capacity, which is to be gauged by reference to the builders' plan. What is meant in these circumstances is that there is 300,000 cubic feet bale space, which the charterers can see by looking at the plan, which is available for carrying cargo, and that space, even if they like to fill it up with dunnage, will be there. The dunnage is used for the charterers' account, and they cannot complain that there has been a breach by the shipowners of their guarantee.

In these circumstances there has been no breach of the guarantee

(1) [1917] 2 K. B. 657, 662; ante, p. 611.

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by the shipowners, and I must therefore answer the question put to me in the negative. The award will stand.

Solicitors for shipowners: *Holman, Fenwick & Willan.*

Solicitors for charterers: *Rawle, Johnstone & Co., for Hill, Dickenson & Co., Liverpool.*

J. E. A.

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March 26; *April* 10.

YORKE *v.* YORKSHIRE INSURANCE COMPANY, LIMITED.

[1917 Y. 306.]

Insurance (Life)—Proposal—Questions—Illness—Ambiguity—Truth of Answer—Matter of Fact or Opinion—Materiality—Evidence of Experts — Admissibility—Costs — Separate Issues — Rules of the Supreme Court, 1883, *Order* LXV., *rr.* 1, 2.

A printed form of proposal, dated December 12, 1916, for a policy of life insurance contained a number of questions, including the following: "What illnesses have you suffered?"—to which the answer of the intending assured was, "None of any consequence." The intending assured also signed a declaration to the effect that the statements in the proposal were true and that the declaration and proposal should be the basis of the contract between him and the insurance company, and that if any material information had been withheld, or if any of the statements had not been made truly, the insurance should be void. A policy was issued which provided that the proposal and declaration should form the basis of the contract. After the death of the assured the insurance company refused payment of the policy, and in an action on the policy the defendants (the insurance company) pleaded that the above answer and certain other answers were untrue and that the assured had failed to disclose that he suffered from heart trouble and insomnia and was addicted to the veronal habit. The jury found that the assured had suffered from an illness of consequence in 1911, but they found in favour of the plaintiff as to the other matters alleged in the defence:—

Held, that the question as to what illnesses the assured had suffered was not ambiguous, and that the answer thereto was not a mere expression of opinion, and that the untruth of the answer rendered the policy void.

The words "sober and temperate" in a proposal for life insurance refer only to the use and abuse of alcohol, and are inappropriate to drug habits.

The evidence of medical men as to the materiality of facts not

disclosed by an assured is admissible in an action on a policy of life insurance.

Held, also, that the various grounds on which the defendants had alleged that the policy was void were not separate "issues" within the meaning of Order LXV., rr. 1, 2.

FURTHER CONSIDERATION of an action tried by McCardie J. and a special jury.

The plaintiff claimed, as assignee of a policy of insurance, dated January 6, 1917, and granted by the defendants to one Robert Smith, which provided for the payment of 1000*l.* in the event of Smith dying on or before December 4, 1917. The policy was assigned to the plaintiff on February 28, 1917. Smith died on March 25, 1917. The facts were stated by the learned judge in his written judgment as follows :—

"The proposal form, dated December 12, 1916, contained (inter alia) the following questions : What illnesses have you suffered ? Answer : None of consequence. Do you ordinarily enjoy good health ? Answer : Yes. Are you now, and have you always been, of sober and temperate habits ? Answer : Yes. The declaration was as follows : 'I, the person whose life is proposed for insurance, do hereby declare that I am at present in good health, that the foregoing statements are true, and that I have not concealed or withheld any information affecting the risk of an insurance on my life. And I, the person in whose favour the policy is to be granted, do hereby agree that this proposal and declaration shall be the basis of the contract between me and the Yorkshire Insurance Company, Limited, and that if any material information has been withheld, or any of the statements made above have not been truly and fairly set forth, then all moneys which have been paid in consequence thereof shall be forfeited, and the insurance itself shall be absolutely null and void.'

"The defence relied in substance on two main points, namely, (*a*) that the answers to the above questions were untrue, and (*b*) that Smith had failed to disclose that he suffered from heart trouble and from insomnia, and that he was addicted to the veronal habit. It was not specifically pleaded that Smith had suffered from a serious illness in 1911. The facts as to that illness were not then known to the defendants. Prior to the hearing before

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me a trial had taken place before Darling J. and a special jury. The jury could not then agree. In the course of that trial the circumstances with respect to the illness in 1911 became known to the defendants. Thereupon an amendment of the pleadings was granted by Darling J. whereby the defendants were allowed to rely on that illness as a part of their defence. I concur with Darling J. in thinking that the amendment could properly be allowed. Upon the pleadings so amended the second trial took place before me.

"The questions left to the jury and their answers thereto were as follows:—(1.) Had Smith suffered from any illness of consequence prior to December 12, 1916? Answer: Yes, in 1911. (2.) Was Smith on December 12, 1916, in good health? Answer: Yes. (3.) Had Smith prior to December 12, 1916, suffered from insomnia? Answer: Yes, occasionally. (4.) If Yes, was it material for the defendants to know that fact? Answer: No. (5.) Had he prior to December 12, 1916, been in the habit of using veronal? Answer: Occasionally, but there is not enough evidence to prove habit. (6.) If Yes, was it material for the defendants to know that fact? (No answer.) (7.) Was Smith on and prior to December 12, 1916, of sober and temperate habits with respect to veronal? Answer: Yes. (8.) Was Smith on or prior to December 12, 1916, suffering from heart trouble? Answer: No. (9.) If Yes, was he aware of the fact? (No answer.) (10.) If Yes, was it material to the defendants to know such fact? (No answer.) (11.) Was it material for the defendants to know the substance of the information contained in Sir James Mackenzie's letter of October 20, 1916? Answer: No."

Tindal Atkinson, K.C., and *Haydon*, for the plaintiff. The answer of the jury to the first question is the only one which is not in the plaintiff's favour, but notwithstanding that answer the plaintiff is entitled to judgment. The question in the proposal form, on which the first question to the jury was founded, is: "What illnesses have you suffered?" and the answer of the assured was: "None of consequence." The words "of consequence" show that the answer of the assured was not intended to be a statement of fact; it was a mere expression of opinion. The

policy is therefore not vitiated by the jury's finding. Further, the question is ambiguous, both as regards the meaning of the word "illnesses" and the period to which the question relates. The word "illness" has various meanings; it may mean either the quality or condition of being ill, or it may mean a specific disease. The form of the assured's answer shows that the latter, which is the more usual meaning, is the meaning given to the word by the assured. This view is further supported by the fact that in the written questions in the medical examination, the answers to which, together with the proposal and declaration, are declared to form the basis of the contract, after various specific ailments have been mentioned, the assured is asked whether he has suffered from "any other disease," and his answer was "have never suffered from any serious illness." The question in the proposal form, being ambiguous, must be given that meaning which is most favourable to the assured: *Anderson* v. *Fitzgerald* (1), per Lord St. Leonards; *Thomson* v. *Weems* (2), per Lord Watson; *Gluckstein* v. *Barnes* (3), per Lord Macnaghten. If the defendants are entitled to judgment, they should be ordered to pay the costs of the issues on which they have failed. The question raised by the defence as to the assured's being addicted to the habitual use of veronal, which has occasioned a very large proportion of the costs incurred, is a separate "issue" within the meaning of Order LXV., r. 2, as also are the other matters which the jury determined in the plaintiff's favour.

Sir Ernest Pollock, K.C., and *Shakespeare*, for the defendants. The statement contained in the answer of the assured to the question as to "illnesses" in the proposal form was a statement as to a matter of fact and not of opinion, and there is no ambiguity in the question. The statement of the assured having been made the basis of the contract, no question as to materiality arises, and the answer of the jury to the first question left to them is conclusive in the defendants' favour: *Thomson* v. *Weems*. (4)

As to costs, the defence raised no separate issues within the meaning of Order LXV., r. 2. There was only one issue, namely,

(1) (1853) 4 H. L. C. 484, 507.
(2) (1884) 9 App. Cas. 671, 687.
(3) [1900] A. C. 240, 250.
(4) 9 App. Cas. 671.

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whether the policy was void. The various matters which the defendants relied on in support of that defence did not raise separate issues.

Haydon replied.

Cur. adv. vult.

April 10. McCARDIE J. read the following judgment:—This action was tried before a special jury and myself. It raises several points of general interest and legal importance. The plaintiff claims 1000*l.* as the assignee of a life policy issued by the defendants on January 6, 1917, upon the life of one R. Smith. Within three months from the date of the policy Smith died from an overdose of veronal. The policy was for one year. The premium was 11*l.* 4*s.* 2*d.* The defendants assert the invalidity of the policy. Hence this action by the plaintiff. This is the only life policy disputed by the defendants within the past twenty-five years, and I desire to say that in my view they were amply justified in requiring the question of liability to be determined in a Court of justice. The policy provided that the proposal and declaration should form the basis of the contract. [The learned judge stated the facts as set out above, and continued:] I allowed the seventh question at the express request of Sir Ernest Pollock. In my opinion, however, that question was of no juristic relevance, for I think that the words "sober and temperate" must receive such an interpretation as would be placed upon them by ordinary men of normal intelligence and average knowledge of the world. So interpreted, I can entertain no real doubt that they refer only to the use or abuse of alcohol. They are not applicable to the use of veronal or other soporific or narcotic drugs. They are inappropriate to what are known as "drug habits." If in the future an insurance company desires express information with respect to such habits as these, then a further question of a direct character should be added to the proposal form. But it may be well not to increase further the stringent requirements already existing. Unless such a question be expressly asked, insurance companies must, with respect to the use of drugs by a proposer, rely on the rule of law which requires the disclosure of all material facts known to the proposer which might lead the insurer to refuse the risk or

demand a higher premium: see per Bayley and Littledale JJ. in *Lindenau* v. *Desborough* (1); per Lord Campbell C.J. in *Wheelton* v. *Hardisty* (2); per Curiam in *Joel* v. *Law Union and Crown Insurance Co.* (3), in the Court of Appeal.

I may refer to ss. 17 and 18 of the Marine Insurance Act, 1906. This Act, I point out, may frequently be considered with advantage in cases of insurance even though they do not relate to marine risks. For in certain important respects (for example the requirement of uberrima fides) the law is the same whether the insurance be life, fire, or marine: see per Lord Blackburn in *Brownlie* v. *Campbell* (4); per Parke B. in *Moens* v. *Heyworth* (5); Macgillivray on Insurance Law, p. 301; *Seaton* v. *Burnand.* (6)

Now, the effect of the answers given by the jury in the present case is to negative the plea of the defendants that Smith failed to disclose material facts with respect to (*a*) insomnia, (*b*) the use of veronal, and (*c*) heart trouble. The jury have found in favour of the plaintiff on those points. They tried the case with great care and patience, and, although I myself might not have arrived at the same conclusion with respect to the veronal and insomnia questions, I am bound, of course, to recognize their findings. The defendants, however, claim judgment by reason of the answer of the jury to the first question. But Mr. Tindal Atkinson and Mr. Haydon submitted an able and ingenious argument in support of the contention that the plaintiff was entitled to judgment in spite of that answer. They contended (in substance) that the question in the proposal form, "What illnesses have you suffered?" was ambiguous, and that the answer of Smith could not be relied upon by the defendants, inasmuch as it expressed an opinion only in reply to a question alleged to be obscurely framed. But, in my view, this contention fails. The word "illness" has not been heretofore judicially defined. The case of *Burton* v. *Eyden* (7), in which it was held by the Court that "sickness" may include insanity, throws no real light on the matter. The word "illness"

(1) (1828) 8 B. & C. 586, 592, 593.
(2) (1857) 8 E. & B. 232, 270.
(3) [1908] 2 K. B. 863.
(4) (1880) 5 App. Cas. 925, 954.
(5) (1842) 10 M. & W. 147, 157.
(6) [1899] 1 Q. B. 782; [1900] A. C. 135.
(7) (1873) L. R. 8 Q. B. 295.

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must be construed in a fair business manner. It must ever be a question of degree. A man may be ill without being nigh unto death. On the other hand, a man may suffer from an ailment which does not amount to an "illness." Physical or nervous disorder varies in nature and gravity. One set of facts may obviously amount to illness; another set of facts may obviously amount to a mere indisposition. A headache is one thing; brain fever is another thing. An intermediate state of things may give rise to doubt. But a like difficulty occurs upon many questions of fact which come before the Courts—for example, as to a reasonable time or as to criminal negligence. And equally, too, does the difficulty arise in the application to insurance cases of the uberrima fides rule as to the disclosure of material facts. Materiality may well be said to be a mixture of fact and opinion. But in the actual affairs of life and in the ordinary work of the Courts these difficulties are solved every day. The plainest doctrine of law might be subverted, if studied refinement and astute illustrative argument were allowed to negative the instincts and conclusions of every-day good sense. The argument based on the ambiguity of the question "What illnesses have you suffered?" bears a close resemblance to the argument presented to the House of Lords in the well-known case of *Thomson* v. *Weems*. (1) There the proposal form contained, inter alia, the following questions: "Are you temperate in your habits and have you always been strictly so?" It was submitted to the House of Lords that the questions were uncertain and that the answers to be given raised matters of opinion rather than of fact. But that submission was decisively rejected by the Lords of Appeal. I need not read the passages in full, but Lord Blackburn and Lord Watson deal with the matter. (2) Hence the plaintiff in *Thomson* v. *Weems* (1) failed by reason of the incorrectness of answers, the truth of which had been warranted. It may be that such a question also as "Are you in good health?" admits of discussion if one embarks on subtle analysis, for "good health" is a phrase difficult to define. Yet an effort was made by Lord Fullerton in the Scotch case of *Hutchison* v. *National Loan Fund Life Assurance Society* (3),

(1) 9 App. Cas. 671. (2) 9 App. Cas. 684, 687, 688, 690.
(3) (1845) 7 D. 467, 478.

where, in language of graceful balance, he described "good health" as "the perfect, conscious enjoyment of all one's faculties and functions, and the conscious freedom from any ailment affecting them, or any symptom of ailment." But I venture to think that a man may be in good health although he lacks the full possession of that exultant and joyous vitality indicated by Lord Fullerton. Even a pessimist may be a fit subject of life insurance.

A jury can be relied on to know the meaning of the phrase "good health" as employed in the usual affairs of life, just as they will know the meaning of the words "sober and temperate" as used by the ordinary man in the omnibus, the office, or the restaurant. A question may be a question of fact although the element of opinion is involved therein. In the present case I think that the jury were amply justified in forming the view that the illness from which Smith suffered in 1911 was an illness of consequence. In November of that year he lay in a critical condition through an overdose of veronal. His relatives were sent for. Dr. Ealer attended him for about a fortnight. He then recuperated at Bournemouth for about ten days. These facts were proved by Dr. Ealer (a witness for the plaintiff), who stated that he regarded Smith's illness as serious. The jury clearly accepted his view of the matter, and I agree with the jury. It therefore follows that the proposal form contained a statement which was substantially incorrect, and hence, as the warranty of truth was broken, the policy became void. Judgment must therefore be entered for the defendants.

I desire (before considering the serious question of costs) to say a few words on an evidential point of general importance which arose in the course of the medical testimony. Both in the cross-examination of the plaintiff's doctors and also in the examination-in-chief of their own witnesses the defendants' counsel asked questions (which I allowed) directed to two points, namely, (*a*) whether it was material for an insurance company to know of a veronal habit or of insomnia trouble on the part of the proposer, and (*b*) whether or not the illness of 1911 should be regarded as one of consequence. Mr. Tindal Atkinson objected to these questions, but in my opinion they were admissible. The view of the

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Courts as to expert evidence in insurance cases seems to have developed. In the days of Lord Mansfield such evidence was apparently regarded as irrelevant: see, for example, *Carter* v. *Boehm*. (1) But the views of 150 years ago have been modified by the broader outlook of later judges and by a clearer realization of the utility of expert testimony as an aid to the administration of justice. *Carter* v. *Boehm* (1) was a case of the insurance of a fort in Sumatra, but Lord Mansfield dealt with it on the same footing as a marine insurance. In marine insurance cases the law to-day is not as it apparently was in 1766. Expert evidence with respect to the materiality of a fact has been freely admitted in recent years by the experienced judges who have administered, and are now administering, justice in the Commercial Court. The practice I conceive is settled: see per Mathew J. in *Herring* v. *Janson* (2); Arnould on Marine Insurance, 9th ed., s. 626; per Hamilton J. in *Scottish Shire Line* v. *London and Provincial Marine and General Insurance Co.* (3); see also *Associated Oil Carriers* v. *Union Insurance Society of Canton* (4), per Atkin J., which is also well reported as to the evidence in 33 Times L. R. 328. I conceive that no sound distinction can be drawn between cases of marine insurance as distinguished from life, fire, or other heads of insurance business: see, for example, Macgillivray on Insurance Law, p. 315; Smith's Leading Cases, notes to *Carter* v. *Boehm* (1), 12th ed., vol. 1, pp. 570 et seq. Expert evidence may frequently afford great assistance to the Court upon questions of novelty or doubt. If excluded, it would deprive the Court of ascertaining those considerations and views which a tribunal may well require to know, and the insurance witness would by process of law be stricken with absolute silence upon matters of vital importance to him. Judges are always free to test and revise every form of expert testimony.

It may be said, however, that in the marine insurance cases to which I have referred the expert evidence has usually been given by those actually engaged in the occupation of insurers. I agree that this is so, but it must be pointed out that in questions of life insurance the matters at issue are usually physiological, medical,

(1) (1766) 3 Burr. 1905.
(2) (1895) 1 Com. Cas. 177.
(3) [1912] 3 K. B. 51, 70.
(4) [1917] 2 K. B. 184.

or neuropathic. The directors of insurance companies, however, are but rarely medical men. Seldom, if at all, do they personally see the proposer. They rely to a great extent on the reports and advice of medical men. The importance or otherwise of that which should be disclosed to a life insurance company may well be appreciated only by doctors or surgeons. Medical men may therefore often give a more useful opinion than the directors themselves as to what is or is not material or important. Hence the admission of a medical opinion by Lord Tenterden C.J. in the life insurance case of *Lindenau* v. *Desborough*. (1) Upon consideration, therefore, I am confirmed in the view I took at the trial that the evidence in question was admissible. I may add that I am satisfied that the jury would have given the same answer to the first question even if the evidence objected to by Mr. Tindal Atkinson had been excluded.

I must now consider the question of costs. The amendment I referred to in the earlier part of this judgment was allowed by Darling J. without the imposition of terms. But, apart from the question of that amendment, there remains the broad fact that the defendants failed upon several of the points raised by them namely, the points indicated by the questions other than question 1. Sir Ernest Pollock offered, on behalf of the defendants, to leave the question of costs to my discretion, but the plaintiff's counsel felt unable to accept this offer and required me to deal with the question of costs on a strict technical footing. I must therefore do so. Now, do the points raised by the questions left to the jury raise separate issues within Order LXV., rr. 1, 2 ? If so, the plaintiff will be entitled to the costs of the issues on which she succeeded. It is the duty of the judge at the trial to determine whether any separate issues arise : see *Bush* v. *Rogers* (2), per Bankes J. I respectfully agree with the view of Bankes J. that the burden of such determination should rest upon the trial judge rather than upon the taxing Master. In *Bush* v. *Rogers* (2) there were clearly two causes of action. The meaning of the word "issue" is, I regret to say, fraught with doubt. No decisive working definition exists, but two points seem to be clear. Firstly, that a separate cause of action prima facie will constitute a separate issue : see,

(1) 8 B. & C. 587. (2) [1915] 1 K. B. 707.

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for example, *Myers* v. *Defries*. (1) Secondly, that each question left to the jury does not either necessarily or even usually constitute a separate issue: see *Howell* v. *Dering*. (2) It is moreover impossible to say that every question of fact in dispute between a plaintiff and defendant is an issue: see per Buckley L.J. in the same case. (3) The word "issue" was defined by Buckley L.J. in the same decision (3) as follows: "An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some other consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence." But, as that distinguished lawyer felt, the definition I have quoted may appear upon analysis to be somewhat inexhaustive. I need not discuss the various decisions in detail. Some were referred to in *Howell* v. *Dering* (2), and many are cited in the notes to Order LXV., rr. 1, 2, in the Annual Practice. I may mention, however, *Wagstaffe* v. *Bentley*. (4) In that case the defendant pleaded in answer to a claim for negligence (*a*) denial of the negligence, (*b*) contributory negligence, and (*c*) a payment into Court. The Court of Appeal apparently took the view that each of these heads constituted a separate issue. I doubt, with respect, whether a payment into Court raises a true issue, for the effect of payment must be determined by the operation of Order XXII. So, too, I should have felt that (*a*) and (*b*) apparently constitute but one issue. I may mention also *Slatford* v. *Erlebach* (5), where the plaintiff sued for moneys due for building a house. The defendant pleaded (*a*) that no moneys were due, and (*b*) that the claim was barred by the Statute of Limitations. The defendant failed on point (*a*), but succeeded on point (*b*). It was held that the plaintiff was entitled to the costs of proving the issue (*a*). With the above decisions should be compared the observations of Phillimore L.J. in *Quirk* v. *Thomas* (6) and the decision of Phillimore and Pickford L.JJ. in *Bird* v. *Standard Oil Company of Canada*. (7) Decisions in actions tried by a judge alone may not be of great value, for the word "issue" is sometimes

(1) (1880) 5 Ex. D. 180.
(2) [1915] 1 K. B. 54.
(3) Ibid. 62.
(4) [1902] 1 K. B. 124.
(5) [1912] 3 K. B. 155.
(6) [1916] 1 K. B. 516, 535.
(7) (1915) 114 L. T. 316.

loosely employed and a wide discretion as to costs exists in those cases.

To test the present circumstances, let me suppose that a defendant in his plea of contributory negligence gives six heads in the particulars of that plea and fails on four whilst succeeding on two of those heads. He will thus establish his plea. Ought he in that case to pay the costs of the four heads on which he has failed? So, too, when a plaintiff gives several heads of particulars in his claim for negligence and succeeds on some only, will he not get the costs of the action? A subtle and assiduous disintegration of the heads of a claim or particulars, or of a defence, for the purpose of a minute apportionment of costs, may lead to confusion. Compare, however, the case of a defendant who (to a claim for negligence) pleads (*a*) denial of negligence, (*b*) accord and satisfaction. Here it seems that there will be separate issues. For the points will be independent and the evidence as to each point may be isolated in character. I cannot, without undue prolongation of this judgment, further analyse the matter. I trust that the whole question will some day receive a clear and final formulation in the Court of Appeal.

In the present case I have come to the conclusion that question 1 does not raise a separate issue. It raises a separate point of fact, but not a separate issue. The whole of the questions left to the jury go to the validity of the policy and not to such independent matters as may arise in other actions, such as accord and satisfaction, or release, or payment into Court. All the questions here are but branches of one head of defence, namely, that the policy was avoided by misstatement and non-disclosure. As the defendants have proved a substantial misstatement they succeed on the issue raised in the case, and none the less so because they failed to prove other misstatements alleged by them. It is true that the later questions put to the jury by me relate to concealment rather than misstatement. But those questions are all founded on the basic words contained in the proposal and declaration. The misstatement actually found by the jury in answer to question 1 carries with it by irresistible implication the wrongful failure by Smith to disclose to the defendants the grave illness from which he had suffered in 1911.

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I must therefore decide that no separate issues exist in the present case. Judgment will therefore be entered for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Penman & Brown, for Thomas Dodds, Newcastle-upon-Tyne.*

Solicitors for defendants: *Gray & Dodsworth.*

F. O. R.

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—— "Not accountable for errors in description": T. & J. HARRISON *v.* KNOWLES & FOSTER - - - C. A. 608

—— "Office": THOMAS *v.* MOORE C. A. 555

—— "Ordinarily kept for a domestic purpose": *See* CRIMINAL LAW - - Div. Ct. 23

—— "Other document": REX *v.* BRAITHWAITE - - - - Div. Ct. 1

—— "Payments for admission to any entertainment": A.-G. *v.* MCLEOD - 13

—— "Proprietor": KEMP *v.* ELISHA C. A. 228

—— "Requisites in form": GUARANTY TRUST CO. OF NEW YORK *v.* HANNAY & CO. - - - - - 43

—— "Residence": REX *v.* BRAITHWAITE Div. Ct. 1

—— "Ship's dead-weight capacity": W. MILLAR & CO. *v.* OWNERS OF S.S. FREDEN 611

—— "Tradesman": HAWKEY *v.* STIRLING Div. Ct. 63

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